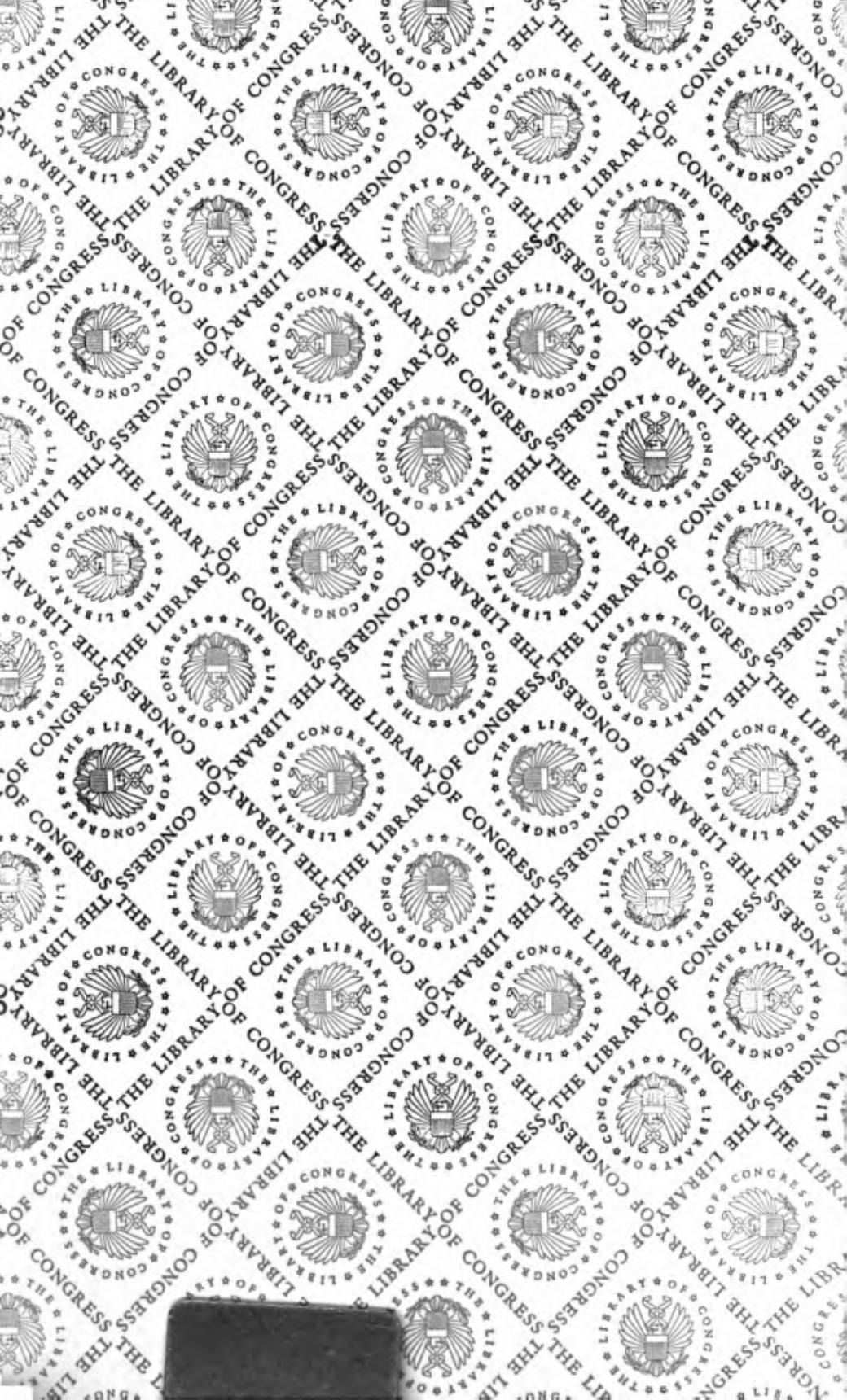
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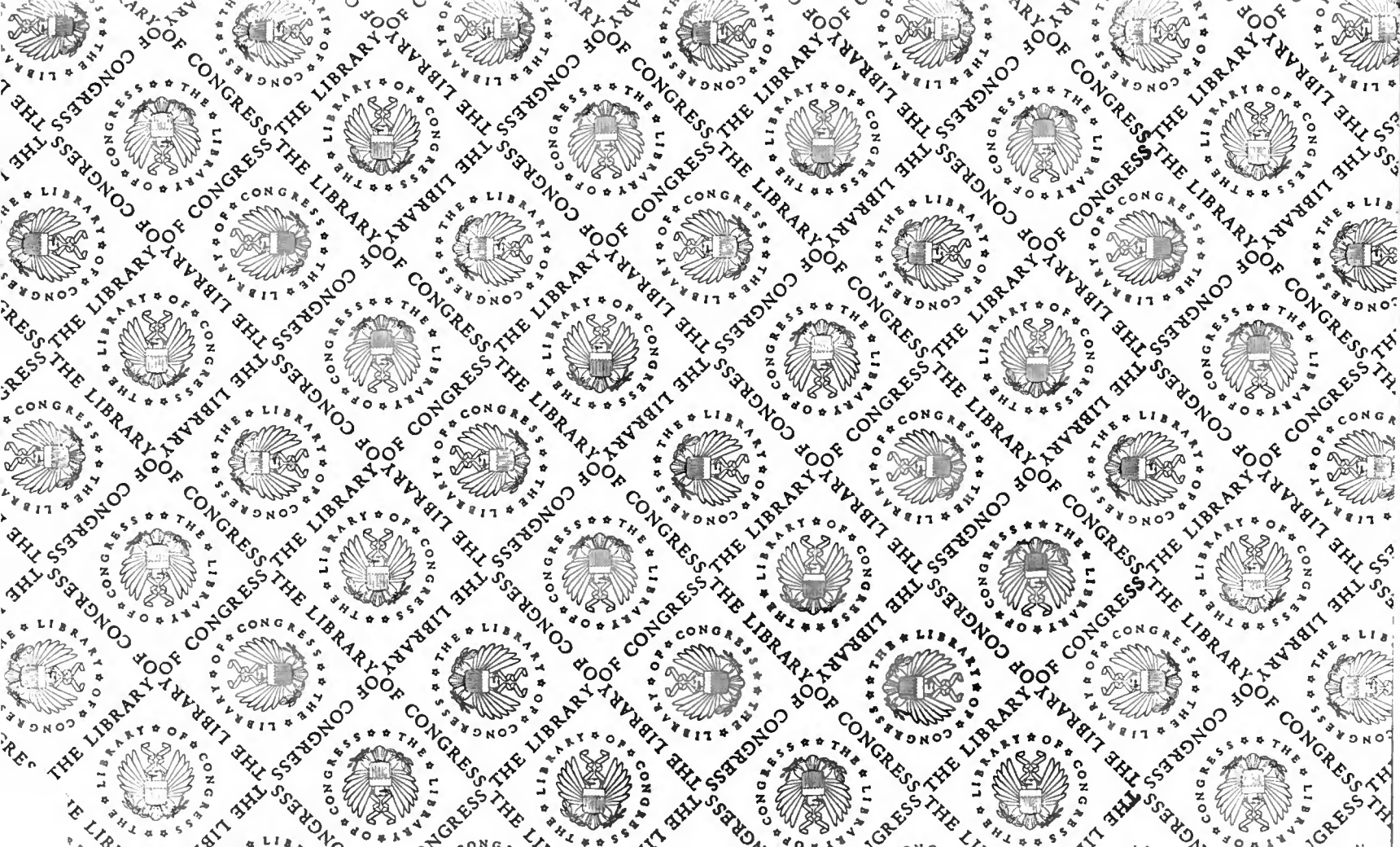
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LEGAL SERVICES CORPORATION REAUTHORIZATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

MAY 9 AND 23, 1990

Serial No. 127

Printed for the use of the Committee on the Judiciary

United States

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LEGAL SERVICES CORPORATION REAUTHORIZATION

WEDNESDAY, MAY 9, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Harley O. Staggers, Jr., Don Edwards, Craig A. Washington, Craig T. James, Lamar S. Smith, and Chuck Douglas.

Also present: Janet S. Potts, chief counsel; Belle Cummins, assistant counsel; Cynthia Blackston, chief clerk; and Roger T. Fleming, minority counsel.

Mr. FRANK. The subcommittee will come to order for the sole purpose of noting that the chairman and ranking member are here ready to take testimony, and none of the witnesses have shown up. I don't know how often that happens around here. So we will now go in recess and wait for a witness.

[Recess.]

Mr. FRANK. The committee will reconvene.

Our colleague, Mr. McCollum, has come, and we are pleased to have him join us today.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

Mr. FRANK. Mr. James, do you have an opening statement?

Mr. JAMES. Yes. I am looking forward to hearing Congressman McCollum's testimony. I know that you are quite an expert on the issues that are confronting us here in many ways, from communications with your constituency to being a lawyer yourself and having practiced a considerable number of years before coming here, you have some practical experience. So I look forward to hearing your testimony.

Mr. MCCOLLUM. Thank you.

Mr. FRANK. Yes. We should note that Congressman McCollum, having been here and is now in his 10th year, had practiced for awhile. He is older than he looks.

Mr. McCollum, we appreciate your interest and please proceed.

STATEMENT OF HON. BILL McCOLLUM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. MCCOLLUM. Thank you, Mr. Chairman. I am delighted that you are holding these hearings, and I am very pleased to be with you. You and I both came to Congress at the same time, and actually I do have a few gray hairs. I am beginning to manage that.

I am, in all seriousness, concerned about legal services as you are and have been over the years. We recall, looking back to 1981, when this committee last worked on an authorization bill. It was a long time ago. And at that time we had a pretty good product, I think, pass the House. Unfortunately, the Senate and the administration did not choose to go along with reauthorization.

I think the climate has changed a lot since then, and I would like to, if I could, Mr. Chairman, make a few comments about what has changed, and what is important. I have a statement, but I would prefer not to read it. I don't like them read in front of me. But I would like to submit the statement for the record, if I could.

Mr. FRANK. Without objection, we will be glad to take that for the record.

Mr. MCCOLLUM. Thank you. The bottom line of it all is that Charley Stenholm, my colleague who will be here in a few moments I am sure, and I have been involved for a long time in supporting Legal Services Corporation. We are not the enemy. We are people who believe deeply in the legal process and in the fact that we need to provide legal services to the poor and that there is a place for Legal Services to do that nationally.

The problem was that for a long time there were people, in my political party particularly, who did not believe that we ought to have the Corporation at all. Because of what I think became a very entrenched position on each side, including those who thought there was a group out there wanting to kill the program and were trying to protect every vestige of the existing system, we failed to get the kind of legislative reforms that I think would make the system operate efficiently and provide those services that were intended.

So a couple of years ago in frustration over the absence of an ability to move any kind of a product like you are looking forward to moving here in reauthorization, Mr. Stenholm and I proposed a series of amendments through the appropriations process. That is not the way we like to go and so we are hopeful that your subcommittee and our full Judiciary Committee can adopt some of those proposals in the authorization procedure that you are now undertaking.

There are a couple of things that need to be said as well. The proposals aren't perfect. There is nothing that we are offering here that is absolutely locked in any kind of concrete. I realize there are critics of some of these suggestions. I am going to meet this afternoon, for example, with the American Bar Association and I hope that some of the criticisms they have suggested can be incorporated into this language.

But the bottom line is we need more accountability and we need to get more direction in Legal Services Corporation. We have a new board. A new board that has been appointed—or nominated at

least, I think this board will provide the kind of leadership that has been missing in Legal Services for some time.

With that in mind, and with anticipation that they will be confirmed in a reasonable order, although that process in the Senate takes quite a while, I would like to suggest some of these accountability provisions and go through them with you for a moment.

In terms of accountability one provision that I think is really important is the application to grantees of Federal criminal laws pertaining to theft and waste. It is simply a fact that the statutes at the present time do not apply for some reason to this agency. This is a very simple procedural change. I don't think it ought to be controversial.

Second, we are proposing the establishment of a timekeeping system. One of the proposals that Charley and I have had for quite a while was to make sure that the records were kept. There are those in the Legal Services field offices who don't want to do that, and there were people in my law firm who didn't want to do it. But it seems to me that it is basic that we keep time records. Attorneys must keep those records so that those who are the managers of the firm, in this case the managers of the programs, can establish the timekeeping records.

I am pleased my colleague Mr. Stenholm has joined me here.

The third thing in the accounting area that I think is important is the strengthening of the authority of the grantees' boards of directors. Back in 1981, in that authorization proposal and what was ultimately adopted from it by the appropriations process that has been governing the national board since then, we did provide for local bar control. Congress decided that a majority of the members of the boards of directors of each of the nonprofit organizations that receive the Federal moneys and run the Legal Services operations in the field be appointed by a local bar association, so that we have local control, in theory. The problem is accountability, and we suggest in our proposed amendment that there be greater flexibility given to that board to really do the job.

For one thing we think that the local board ought to have the power to say, at least in general policy terms, what the local Legal Services lawyers are doing, what type of cases they are handling, what their caseload is, and how they apportion time, since we have such a limited amount of resources and only a limited amount of time to do infinite number of possible types of things for the poor. And we ought to be sure that when it comes to meeting schedules and so forth that that local board is indeed the board that is in control.

Now, in addition to that process, there are some other changes that I think are very, very desirable. One of those changes is a restriction on the involvement of grantees in redistricting cases. We have debated that in Congress a number of times. It makes no sense, in my judgment, for reapportionment battles to be fought by Legal Services lawyers. I know there are critics of that too, but it just seems to me, and it has been long overdue that we get them out of this political arena. They ought to be working on cases involving ordinary legal assistance.

Fourth, I think that there ought to be some limitations on the manner in which the agricultural lawsuits are brought. Right now

what we have discovered in our work and studies, and I have had many, many of the farmers in my area come in to talk to me, and I know over the years many of my colleagues have talked with farmers, that there is a form of harassment involved in this process. I want to see the workers have their rights as well as anybody else and I don't want to deny them the representation by Legal Services lawyers. But if you can go out and get a multiplicity of people to sign up or sign them up without even getting their concurrence, and you go out and solicit the clients, so to speak, through a field rep and you come in and you bring a whole bunch of charges against a farmer who can't afford to defend that lawsuit, you all of a sudden have an oppressive situation. And we have suggested simple procedures that I think would go a long way toward making a difference in the agricultural area, not to deny eligible clients the right, but to simply say that if you are going to file a lawsuit, you have got to list all of the aggrieved parties, who the really complaining parties are, and have an open process for determining these things and so forth.

Then I think one really important reform that needs to be done is the restriction on the use of private funds, and for that matter public funds. It was called to my attention yesterday that perhaps we omitted this latter concept and it ought to be in here.

Right now there are a number of restrictions, as you know, on Legal Services Corporation activities that were imposed by Congress. We decided we didn't want them lobbying. We didn't want them lobbying you or me or the people at the State legislative offices. Yet that restriction is circumvented because the Legal Services lawyers in the field and those individual grantees say, "Look. We got our private funds. We got so and so to donate. Or we got the State of Florida, the State of Maine, or whatever to give us separate funds, and that is not federally appropriated money and therefore because of the way the Federal Government law, or the way that this LSC law is now written, we are not restricted in that capacity. The only thing you can restrict us on are our activities using federally appropriated dollars."

That is nonsense. If this Congress is going to set up a legal services program, and we created it in the first place, and we are going to give grants out, it doesn't seem to me that anybody ought to be a grantee who isn't going to fully comply with the wishes of Congress with regard to the parameters of the things they do. If we have got restrictions, then they ought to be held to abide by those restrictions regardless of the source of the funds they may have independent of Congress, or else we ought to find some new grantees who will abide by those restrictions.

And last, but not least, in this is some earmarking of funds that Mr. Stenholm and I thought would be appropriate for child support and antidrug trafficking cases and, in particular, child support. There are studies that we have seen from records that have been kept on Legal Services indicating that there simply is not very much activity in that regard by Legal Services as compared to other activities. With so much of the poverty in this country existing because fathers are abandoning their kids, it seems to us that child support at least should be a significant percentage of legal assistance. It wouldn't have to be the majority or anything like that,

but a significant percentage of the activity of those who are involved in legal services delivery as well as working in the area of some antidrug effort is reasonable to require. And, as I mentioned, this is a very modest proposal on our part to earmark some funds for that purpose.

One last thing I would comment on is in the appropriations language that exists now with a contingency that I certainly hope would come up in the authorization process when we reauthorize, and that is the concept of competitive bidding for these grantees. Right now virtually every grantee who exists out there has been there since the establishment of LSC. Part of that is because our Congress has been concerned that during the Reagan years there would be wholesale changes of some sort and therefore their hands were, essentially, tied.

But that leads to gross inefficiencies in the system, in my judgment, and we need very badly to go to the system that allows the Legal Services Corporation nationally to have a periodic, systematic, organized opportunity for different groups to come in and bid to get the grants in an area. And, if one grantee group can demonstrate that it can perform the legal services functions better than another, more efficiently, more effectively, and so forth, then I think that group should be awarded the grant.

That is not the case today. Competition is, as I say, written into the appropriations law contingent upon the new Board being confirmed in the Senate, appointed and confirmed. They have been nominated now. Appointed, if you will, by the President, but they haven't been confirmed. That, of course, is a transient provision. It is in an appropriations bill. And, while there is some concurrence among those involved in that process, there hasn't been any delineation of that in the authorization language. I submit to you that while it is not a part of the efforts that Mr. Stenholm and I have undertaken, it is certainly an important ingredient in your reauthorization process, and I would urge you to look at that very seriously.

Those are a few things. I am sure all of us could agree there is more that needs to be done in the reauthorization of the Legal Services Corporation because it has been so long since it has been done. But I thank the chairman for listening and letting me submit my views.

Mr. FRANK. Thank you.

[The prepared statement of Mr. McCollum follows:]

STATEMENT BY THE HONORABLE BILL MCCOLLUM OF FLORIDA

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW & GOVERNMENT RELATIONS

REGARDING REAUTHORIZATION OF THE LEGAL SERVICES CORPORATION

Chairman Frank and Members of the Subcommittee, I appreciate the opportunity to appear before this Subcommittee today. As a member of the Judiciary Committee, it is a rare occasion for me to sit on this side of the Committee's dais. And even though I would prefer to ask the questions than answer them, I am delighted to be participating in the Subcommittee's effort to reauthorize the Legal Services Corporation.

I commend you, Mr. Frank, for holding today's hearing. I know from personal experience that this issue from a technical perspective is complicated, and from a political perspective it is controversial. In the past decade efforts by the House Judiciary Committee to pass legislation pertaining to LSC were frustrated by Senate inaction and White House opposition. The assumption that a reauthorization bill was not likely going to become law appears to have had a discouraging effect on the House. There was little incentive for engaging in the time-consuming and divisive process of reporting out such a bill. I am confident that things have changed, particularly with regard to White House opposition. So I salute you, Mr. Chairman, for moving forward at this time.

My hope is that we are entering a new era regarding LSC. As I just mentioned, the White House is supportive of the program. This is evidenced by the President's recent recess appointments to the Corporation's Board of Directors. These appointees already have demonstrated a thoughtful attitude toward this issue, and a firm commitment to carefully and prudently direct the affairs of this important program. Another indication of this new era is the approach to LSC reform adopted by its advocates.

Charlie Stenholm and I have taken the lead in the LSC reform effort, and we both strongly favor the continued existence of the Corporation. It seems to me that the time is right to put an end to the atmosphere of confrontation that has characterized the debate on this program. We should begin to work together to fashion a program that will enjoy a broad consensus of support in Congress.

The amendment that Charlie and I offered to the LSC appropriation last year was intended to do this. We selected what we thought were a core of essential reforms that improved accountability by the grantees and reduced political activism and litigiousness. We have received several suggestions and comments on our proposals. So we are continuing to review our language and make changes where appropriate in anticipation of

offering it again this year if it appears that reauthorization will not be accomplished. This afternoon, I am meeting with representatives from the American Bar Association to hear their views. In the near future, I would like to meet with representatives of the NLADA and the Program Advisory Group to learn about their concerns.

Mr. Chairman, the word "accountability" is mentioned frequently by those of us in the LSC reform movement. Some of the provisions in the McCollum/Stenholm amendment concerned accountability by LSC recipients. In my view, accountability promotes service to the poor. It does so in at least three ways. First, by closely monitoring the actions of LSC grantees, the Corporation knows whether the recipients of funding are efficiently performing their duties, and efficiency directly promotes client service. Second, accountability means that LSC is aware of the grantees' priorities and allocations of resources. This prevents grantees from focusing, for the sake of social activism, on a few "impact cases" and thereby neglecting large numbers of the more "mundane" cases. And third, through strict oversight of the legal services recipients, the Corporation can strengthen the political support for the program. The consensus of support in Congress for LSC gradually will be reduced if it is clear that the national headquarters is incapable of guarding against the misuse of the tax dollars.

There were three key reforms in our amendment last year that were tied to the goal of accountability. They were: 1) the application to grantees of federal criminal laws pertaining to theft and waste; 2) the establishment of a timekeeping system; and 3) the strengthening of the authority of the grantees' boards of directors.

Furthermore, it is my desire to add competition to this year's amendment. According to the FY 1990 LSC appropriation, the competitive awarding of all grants will begin after a new Board of Directors is nominated and confirmed. The obvious reason for this condition is that the appropriators did not want to give the previous Board the authority to competitively award grants. But that concern no longer exists. It is time to do what should have been done long ago. While working out the details of the system will be quite difficult, competition is the best way of promoting efficient use of tax dollars.

The other features of the McCollum/Stenholm amendment related to the curbing of some political activism and litigious practices. These changes included: 1) a restriction on the involvement of grantees in redistricting cases; 2) some significant limitations on the manner in which agricultural suits are brought; 3) a restriction on the use of private funds; and 4) the earmarking of funds for child support litigation and anti-

drug trafficker cases. This latter feature was intended to force the grantees in a small way to serve two clearly perceived needs of eligible clients.

I have attached a summary of these reforms to my statement. And as I said earlier, Mr. Chairman, Charlie and I are most willing to consider any improvements to the specific language of these amendments.

Mr. Chairman, let me say in conclusion that I would like to see this Subcommittee report a bill that incorporates our proposals. That may sound like a naive desire on my part. Nevertheless, I firmly believe that there is a possibility to achieve a consensus of support for a reauthorization bill that includes meaningful reforms and still preserves the fundamental purpose of LSC.

I thank you for your attention, and will be pleased to answer any questions.

SUMMARY OF THE PROVISIONS IN THE FY 1990 McCOLLUM/STENHOLM AMENDMENT

Redistricting Activity

This provision would prohibit LSC funds from being used by legal services lawyers to advocate for or oppose any redistricting plan. Most Members of Congress agree that LSC funded lawyers should not be involved in political activities. Instead, these lawyers should be providing day-to-day legal assistance to those who are unable to afford the cost of an attorney. If there is one clear example of political activity, redistricting litigation is it. It clearly is inappropriate to have the taxpayers of this country supporting the political battles that inevitably will be fought over the reapportionment plans developed after the upcoming census.

In a 1984 survey of all LSC grantees conducted by the Senate Labor and Human Resources Committee, 34 of the grantees admitted that they were involved in redistricting and reapportionment activities, including litigation and lobbying. Some programs had purchased computers and software for such activities. At least three quarters of a million dollars have been spent by grantees in these activities.

Theft, Waste and Fraud

Most Members of Congress would be shocked to learn that federal criminal laws applicable to the theft of federal funds and the obstruction of federal auditors do not apply to lawyers

who receive grants from the Legal Services Corporation. Yet, that is exactly the case. This provision would bring LSC grantees under the coverage of statutes prohibiting: 1) false claims; 2) embezzlement; 3) the filing of false information; 4) possession of false papers for the purpose of defrauding the U.S.; 5) obstruction of audits; and 6) perjury. In the past, LSC has discovered incidents of theft of grant monies in the course of routine audits, but both the Corporation and the Department of Justice have been unable to punish the perpetrators. There is no moral distinction between a defense contractor that steals tax dollars and an LSC grantee that does the same thing.

Abuse of Agricultural Employers

Growers in many regions of the country have been complaining about the tactics of legal services attorneys. A typical case is as follows: After soliciting clients from among groups of farmworkers, a legal services lawyer will send a letter to a farmer stating that some unnamed farmworkers are going to sue him for a variety of violations of law unless the farmer pays the lawyer a specified sum of money. When the farmer refuses to pay without further information about the identities of the farmworkers or the nature of the allegations, he is sued. The farmer then spends thousands on lawyers fees. In some cases

growers have gone bankrupt as a result of this litigation which, ironically, means that farmworker jobs are lost.

Therefore, this amendment provides for the following: 1) it prohibits solicitation of clients; 2) it requires the use of mediation services if available; 3) it requires the exhaustion of administrative remedies before a law suit can be filed; and 4) it requires the identifying of plaintiffs and the specification of the factual basis of all claims against a grower.

Some growers deserve to be sued because they clearly exploit their workers. These employers will not be protected by this amendment. But reports from around the country indicate that many growers are being victimized by legal services lawyers abusing the powers of the legal system. This amendment is intended to reign in some abuses by these lawyers.

Timekeeping Requirement

This amendment requires all attorneys who are employed by grantees of LSC to keep records of the time spent on every case on which they work. Such records must be kept at the time the work is performed, not estimated at some later date. Timekeeping is a standard part of every lawyer's professional life. Since legal services lawyers are quick to demand that they be treated

under the law like any private attorney, this requirement should be considered quite reasonable. Such records already are being kept for the purpose of fee-generating cases. Furthermore, time records are the most effective way of determining if a grantee is properly serving the eligible clients in its service area.

Governing Board Authority

This amendment clarifies that the board of directors of an LSC grantee has the authority to establish the priorities of the grantee. The LSC Authorization Act requires a grantee to set priorities, given its limited resources, for the types of cases it should accept based upon the needs of the eligible clients in the area. In 1981, I successfully offered an amendment to the LSC reauthorization bill that required every grantee to have a majority of individuals on its board of directors be appointed by the local bar association to which a majority of the lawyers in the area have their membership. The purpose of this amendment was to ensure that the grantees were being directed by lawyers who represented the broad consensus of the community. My amendment has been included in every subsequent appropriation for LSC since 1981. Now, however, some are attempting to argue that these governing boards do not have the authority to establish the priorities of the grantees they govern and to determine the types of cases on which its employees will work. This amendment will put that issue to rest.

Restrictions on the Use of Private Funding

This amendment requires all LSC grantees to expend the non-appropriated funding they receive in a manner consistent with the restrictions that affect the use of monies appropriated by Congress. Legal services lawyers frequently engage in litigation and other conduct prohibited by the annual appropriations bills by claiming that such activities are being financed by private funds. The LSC Authorization Act expressly prohibits the use of private funds to engage in activities prohibited by the Act. Therefore, since the limitations on the activities of these attorneys have increased since passage of the Act (these limitations have been added to the annual LSC appropriations), it is only logical that the use of private funds should also carry increased limitations.

This proposition certainly is fair. If civil rights laws apply to an entire institution when only one part of that institution receives federal funds, then this amendment is necessary for Congress to be consistent in its treatment of private entities.

Expansion of Child Support and Anti-Drug Trafficker Cases

This amendment requires $20 million of LSC's basic field grants to be used to enforce child support obligations or to obtain such support. Currently, less than 3% of all LSC grant

monies are used for this critical need. This earmarking would more than triple this activity. It is an eminently wise policy for Congress to require federally subsidized lawyers to assist in the alleviation of the enormous federal and state financial burdens posed by irresponsible parents.

This amendment also directs LSC to spend not less than $5 million to assist public housing tenants who are attempting to evict drug traffickers from their neighborhoods. Again, this is an initiative that is consistent with our nearly $10 billion national anti-drug program.

Mr. FRANK. And now we will hear from Mr. Stenholm, and then if members have questions—Mr. Stenholm and Mr. McCollum had asked that they appear together because they have been collaborating. So we will hear from Mr. Stenholm, and then if there are any questions members can address them to both.

Mr. Stenholm has also been very active in trying to work on the legal services program, and we appreciate your coming before us.

STATEMENT OF HON. CHARLES W. STENHOLM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. STENHOLM. Thank you, Mr. Chairman. I too join in commending you and other members of the committee for convening this hearing and the other hearings that you have scheduled, and totally lend my support and thanks to you for moving forward with reauthorization of the legal services program. It has been far too long in coming. We hope this year that under your leadership we shall be successful.

Before I say anything else, I want to reiterate something that I have tried to make perfectly clear on the floor last year in our last attempt to amend the Legal Services Act and in every other utterance that we make publicly. I want to reiterate that I believe in Legal Services. I know some people continue to cast aspersions on my truthfulness and that of my colleague, Mr. McCollum, when we say that. I don't know what else I can do except to sit here and look you straight in the eye and say I believe in Legal Services. I hope that my credibility is such that if you hear something contrary from other witnesses or other statements about our intentions that it will be their and not my assertions that are questioned.

I believe that the majority of Legal Services attorneys are providing the services that Congress intended back in the early seventies. I believe that legal representation for the poor is vital in our American system, and I feel that much good is being accomplished today by many LSC attorneys. That is why I do not support abolishing the LSC, as some do, and I will admit that I did when I first came to Congress. The fact that I have come to be so convinced in the importance of legal services for the poor is why I am committed to seeing some reforms enacted.

It is my impression that the inappropriate activities of a small fraction of LSC attorneys are, in effect, stealing money for the pursuit of a political agenda, rather than meeting the genuine day-to-day legal needs of poor people. When one hears that Legal Services grantees developed and distributed brochures such as "The Law and Direct Citizen Action," which talks about organizing for social change and training citizens in strategies and tactics based on polarization and confrontation, it raises some serious concern. When one knows about publications, a copy of which I possess, developed specifically to teach Legal Services attorneys how to circumvent their local boards of directors, the reality of local control under the current system becomes suspect.

And, in one citizen's letter to me last year I was startled to read, "One Texas LSC attorney told a group of growers that she was there to redistribute wealth and that in a revolution some people

get hurt. Interestingly, her office had pictures of outstanding Democrats like the recent Marxist leaders of Nicaragua instead of her own government officials, just in case we need reminders of where their movement would take us."

These examples help explain why I believe LSC reforms are warranted.

This committee knows, and I readily acknowledge, that since I do not have the privilege of sitting on this panel, I do not have the historical memory and the intimate knowledge of the legal services program which many of you have. I would never pretend to possess your expertise in the field. In fact, unlike the majority of my colleagues, I don't even come to you as an attorney. Most of you know I am a farmer by background, and to help support my farming habits, a teacher by training.

That lack of legal background puts me somewhat at a disadvantage when I am dealing with some of you attorney types. On the other hand, it may give me a little bit of an advantage. By not being so much a part of the legal process, it may be that we can remove ourselves a bit and, as they say, see the forest from the trees. The people in my part of the country talk about a thing called West Texas tractor-seat common sense, and that is the perspective with which I come to the legal services issue.

I don't have the legal background, but I do see some things that, to the average layman, just do not seem to make West Texas common sense, and that bothers me.

To avoid being called a Texas chauvinist, I would like to quote our fellow colleague, Chet Atkins, who recently expressed a similar feeling. Explaining his frustration and anger over Legal Services attorneys representing drug dealers whom housing authorities had attempted to evict—an eviction which, incidentally, was being demanded by fellow housing residents—Chet had this to say: "Legal Services use of taxpayer money to protect drug dealers destroys the public's faith that the Government acts with a modicum of common sense and doesn't follow every nutbag extremist philosophy." Despite the fact that Chet and I, not to mention Texas and Massachusetts, are rarely paired as ideological kindred spirits, in this case, Chet and I are talking about the same language.

Things like waste, fraud and abuse provisions seem so common sense to me that it is hard to understand why they are controversial. The fact that a Legal Services attorney in my district during regular working hours staffs a campaign office seems so blatantly wrong that I can't see why a prohibition on political and redistricting activities should be questioned. Something like timekeeping, which virtually every other attorney in the country must do if he or she expects to get paid, seems so basic that I can't figure the problem with requiring it. It doesn't seem to me that just because the payor in this case happens to be the U.S. taxpayer there is any less reason to keep time and know how our money is being spent.

I recognize that some of the other provisions in the reforms that we have offered are a little more complicated than that. In fact, I recognize that the issue which more than any other got me involved in legal services reform—that being the role some Legal Services attorneys are taking against agricultural producers—that

issue is one of the more legally complicated provisions of the amendment.

Let me assure you that in no way do I want to see the law biased against farmworkers. I suspect that abuses by a small number of producers do occur, and I want those related farmworkers to have access to Legal Services attorneys. But likewise, I do not want to see Legal Services biased against producers, and from the accounts I have heard I believe we have a problem which needs to be corrected.

As you know, the track which Bill McCollum and I have tried to pursue has been to redirect the Legal Services Corporation back toward what we understand Congress' intentions for Legal Services to be: Assisting poor persons in their day-to-day legal needs.

Last October, we offered our amendment to the relevant appropriations bill because that was our only opportunity to put these reforms to a vote. The fact that the reform amendment narrowly failed by seven votes, even though we had very little time to try to educate other members on our amendment, suggests to me that other members have similar concerns and would like to see some remedy.

We feel that as you are considering this reauthorization bill it would be helpful to focus on two goals for Legal Services: Improved accountability and greater local direction. My sincere belief is that by enacting these reforms and causing Legal Services attorneys to act more like other attorneys, the image of the Legal Services lawyer will actually be enhanced along with the program being improved.

Speaking more specifically, we would like to suggest that these two goals would be supported by enacting the following reforms: (1) Prohibition of redistricting activities; (2) application of existing Federal waste, fraud, and abuse provisions to legal services; (3) reforms of acceptable activities by LSC attorneys in farmworker/producer cases; (4) timekeeping requirements; (5) greater authority to Legal Services' local program boards of directors; (6) regulation of private funds; and (7) earmarking of funds for child support and drug cases.

As I mentioned earlier, my background gives me a particular sensitivity to the reform related to ag workers and producers. To give you a feel for the kind of anecdote which has motivated me, I would like to read to you a paragraph from a letter sent to me by one agricultural producer:

"We seem to continually be subject to one or two harassment or new precedent-setting lawsuits despite our best efforts to be good and far above average farm labor employers. Currently, we are working toward settlement over wage payments in the migrant and seasonal workers program violations on employees that never, we believe, worked for either us or our labor contractor. We survived wage and housing scrutiny during the seasons, and yet 2 years later without any notification we are sent a copy of a suit filed against us by a group of people who claim they worked for us and were not properly paid. Naturally they claim recordkeeping violations, because how can we have a payroll record on people who did not work? Why did it take 2 years for a group to remember they worked and were not paid? We will be forced to take the rational

choice and settle $70,000 worth of allegations. The big lesson we learned was not to operate where Legal Services is militant."

Obviously, this farmer was in a catch-22 situation where he was going to lose money no matter what happened. While neither the plaintiff nor the Legal Services attorney could possibly lose money, the producer was guaranteed a financial loss no matter what course of action he chose.

A related example was brought to the House floor by our colleague, Tim Valentine, last year. Tim, who had firsthand knowledge of these cases because he helped constituents draft their responses, said that letters from Legal Services attorneys "said, in effect, that 'I represent a person who has worked for you and you have violated his or her rights,' without naming the individual or without giving enough particulars for that farmer to be able to form any judgment even as to whether or not the person had ever been employed by him. The letters would say, 'if you will send us $5,000 or $3,000 we will end the matter. If you don't pay us, we are going to sue you.' "

As Tim pointed out, unsubstantiated, vague accusations of alleged wrongdoing attached to demands for payments usually get called extortion where I come from. Naturally, I understand that somebody else is going to have a different side to these stories, and I certainly don't presume to take the role which rightly belongs to the courts in such matters.

However, it seems clear to me that things like solicitation of clients, no requirements for mediation or administrative remedy, and no requirement to identify plaintiffs create an environment where abuse can abound. It is possible for us to craft a law where growers who deserve to be sued because they exploit their workers are, in fact, sued without innocent producers being harassed and financially devastated.

Bill and I felt that there were some valid criticisms against our amendment last year, and so we are incorporating some changes which we believe are improvements in which we are recommending to you today.

One area in which we have taken a particularly good hard look is the recommendation relating to the agricultural workers and producers. Using our previous language as a beginning point, we believe the agriculture provision might be improved by: (a) Providing a choice between exhausting administrative remedies or making a good faith effort to use alternative dispute resolution; (b) removing the words "any and all" from the requirement of exhaustive administrative remedies; (c) making the requirement of identifying the plaintiff compatible with the requirement contained in the Federal Rules of Civil Procedure, which all other attorneys follow; (d) allowing the court to omit a plaintiff's name; and (e) removing the requirement that an affidavit be filed with the complaint.

As I have mentioned, Bill and I are reworking our recommendations because we have kept an open mind to the feedback we have received from others. Bill, for example, is meeting this week with representatives from the American Bar Association. Similarly, I want to let you know I have made a point of meeting with the Legal Services attorneys in my own congressional district, and the

meetings I have had with them are always very amicable. As I said earlier, I believe the majority of LSC attorneys are performing a valuable service in a commendable manner, and that certainly is the impression I have of the LSC folks in my district. When my constituents contact me with legal problems, I frequently have cause to refer those constituents to Legal Services and I never have a reservation in doing so.

So my point is that we have valued the input we received as a result of our amendment last year. We are happy to pass along these recommendations to you.

Finally, I want to give you every reassurance that I am eager to work through the committee authorization process, rather than the appropriations process, for trying to enact these reforms. I have always made it clear I am uncomfortable with authorization-type language on an appropriation bill, and that is not my preferred way of doing business.

I am delighted that you, Mr. Chairman, scheduled these authorization hearings and that you have taken time to hear from us today. My fond hope is that the reauthorization process will be completed this year and signed into law by the President.

I also have particularly appreciated the interest which our colleague, Harley Staggers, has taken in this issue, and I look forward to working with this committee in any way that we can to be helpful in the process.

Thank you, Mr. Chairman.

Mr. FRANK. Thank you. Let me say a couple of things. First of all, as I think Mr. McCollum correctly pointed out, the only reason there hasn't been an authorization before—although this subcommittee just got jurisdiction over this bill—it had been in the Courts Subcommittee. We had that deadlocked and it existed with the nonappointment of a board, nonconfirmation of a board. I think all parties agreed that it would be difficult for us to go forward with the board in limbo. I had said that as soon as a board was appointed that appeared to be in sympathy with the program and that was going to be triggering the confirmation process we would go forward. This is as soon afterwards as our schedule would accommodate.

We are planning to move very quickly and, as you know, no one is more eager for the authorization committee to get in here and get the appropriations process simplified than the chairman of the House Appropriations Committee, Mr. Smith. Sometimes appropriators are accused of having turf instincts. This is one where Mr. Smith is more eager than any of us to see that the authorization go forward, and it is our full intention to do that.

Let me just make a couple of substantive points. With regard to the waste and fraud and abuse, I agree that that should be noncontroversial, and it is as far as I am concerned. There is a drafting issue because, if there are other things that go with it, I want them to be dealt with separately; that is, it doesn't automatically do more than that.

But as to applying this is Federal money and Federal money should be treated like Federal money, and if people steal Federal money or abuse it, we have got to deal with that. I agree with that. There are some other issues of agreement.

I also think you have both hit on particularly the issue that seems to me likely to be the most difficult for us this time, and that is to work out some procedures in the agricultural area that preserve the rights of all parties. I do believe some work is needed, and I appreciate that we will be able to work it out. I am delighted that Mr. McCollum said he would be meeting with the American Bar Association.

I think that we will undoubtedly come to some differences of opinion because that always happens. I believe working together we will be able to narrow them, we will be able to resolve some issues, and, you know, we may bring two or three issues to the floor of the House, which is as it should be, and in a situation which we can live with either way because I think we will be able to improve it. So I want to express my appreciation for that spirit. I think that is certainly what we are getting and how we intend to work.

Let me just make one other request. Like the farmer who gets the letter that says "You owe somebody some money and we can't tell you who," I would like when documents are referred to or cited, if you can send me copies of it, that would be helpful to us. The brochures and the letters. You know, if names have to be crossed out to protect the parties, that is perfectly valid. But it would be helpful to us if you could give us copies of those documents because we have, I think, a common interest in trying to minimize these abuses.

Mr. James.

Mr. JAMES. Thank you. I want to thank both Congressman McCollum and Congressman Stenholm for their enlightening testimony. It helped clear up some issues for me. It at least defined many of the issues that you are so concerned about.

I too have had extensive complaints from farmers and attorneys in my district and I know quite well, because I did practice for 20 years and this is my first term, so I know the attorneys are complaining about it. And the two or three that I have talked to that I am quite close to, do have some credibility as far as my communication with them. And, generally speaking, there is a sense of outrage on behalf of the attorneys in regard to some of the actions.

On the other hand, through the years my dealings with the local board have been very favorable in many respects. I have admired the young attorneys that have worked in those programs and they have done some good.

I have always been of the opinion that it is absolutely essential to have free legal services for a substantial number of people. In fact, we surely need more funds in that area.

I think there are several areas that need to be looked at, such as the agricultural community and the awarding of attorneys fees. If a board files a case and they lose it, they should have to pay attorneys' fees, because the people they represent are indigent and oftentimes not even citizens. And, if you put a provision in there which made the boards responsible, because after all they win attorneys' fees in some instances, then they should pay the cost of the suit if the farmer wins. I don't know. That is just a thought or a suggestion. This way it would discipline LSC in some way.

But what amazes me is the fact that we haven't had a proper auditing procedure, and I heard the American Bar Association's statements and testimony saying, "Well, you have an invasion of attorney-client privilege." I don't really buy that when you have the directors up here and we are giving Government money. Yes, attorney-client privilege should be protected, but not between the subcontractor and the contractor.

And that could be handled, I would think, by statute, so that at least we can have an audit procedure. After all, we have seen great evidence of fraud and abuse in the S&L industry. And we have also seen fraud and abuse in the defense industry. We have seen fraud and abuse in HUD. We have seen it in the pharmaceutical industry. Indeed, have we not seen it in our churches in cases? And have we not seen it in many forms of business?

Of course, that is human nature. That is the problem when there is money.

Therefore, you need an audit procedure not only as the mechanism in the disposition of moneys, but you also need an audit procedure in relationship to the direction that the attorneys are to take from the board. This is just as important as an audit procedure. As you pointed out, there is seemingly no excuse to expand those limited funds into an area that is political in nature, such as a class action, in order to establish political lines for voting processes. It may or may not have an impact on the poor where the lines are drawn. That is the type of problem that has a commonality to every issue that faces Congress.

If you used that argument there would not be one single class action that Legal Services would not be involved in. Three hundred million dollars just doesn't go that far. Three billion, $30 billion just doesn't go that far, to expand that circle into that type and class of activity.

On the other hand, there are areas that I think Legal Services has been a great service to the poor. For example, the class action jail suits. I have seen some good done in those areas, and that might be an area that the board would want to direct it to. What we have seen over the last years since it has been started is a limitation on child support. I see very little activity in that area. I used to handle many, many, many of those cases, and when the person just did not have the money, even though the court would award fees in some cases, you could not in most cases get the proper services from Legal Services. At least that was my limited experience when we tried to get it transferred over. So there is plenty of work for them to do.

Another area is many poor people have clouds on their properties. The properties that are so de minimis in value but so large in relationship to their holdings that a private attorney cannot economically or feasibly help them straighten out their title. You have landlord disputes. You have so many disputes, probate disputes, domestic disputes, business disputes of all kinds. Car dealer, car problems, mechanical problems that if you go to Legal Services, well, they don't handle that kind of case. They can't handle this kind and that kind. There are so many areas they are unable to participate in. So I don't quite understand this expansion.

So I want to thank you for your testimony, and I wonder if either one of you could comment on the Combest bill and what the difference is in your bill and the Combest?

Mr. MCCOLLUM. I can honestly say I haven't examined Mr. Combest's bill and I cannot, unfortunately, comment on it. Maybe Mr. Stenholm has. I certainly will before it gets through the process, but to date I have not.

Mr. JAMES. Thank you very much. I am sure you have been very patient with the time. Thank you.

Mr. FRANK. Thank you. Mr. Staggers.

Mr. STAGGERS. Thank you, Mr. Chairman. Number one, I want to congratulate the chairman for holding these hearings. Charley, you mentioned that there are some problems of people who don't believe that you are for Legal Services. There are some problems that people don't believe that the chairman is willing to move this bill, and I think that he is, and I think this is a good example that in fact he does want to work with the process, and I congratulate the chairman for his willingness to work with all sides of this.

And, for those who doubt Charley Stenholm, I serve on the Agriculture Committee with him, and I can verify that in fact you do support legal services and you want to work with the process too. And, I congratulate both of you all for being here today.

I think the bottom line is there are a lot of people that do support legal services, and I think this has been the thing that has split people, and I think Ben Cardin mentions this in his testimony—in fact, I know he does, in his prepared statement. That on a national level it is estimated that only 20 percent of the people who are in need of legal service get legal service, and I think this is a real problem. And part of the problem that I would hope that you all would be willing to work with us also, those who support legal service, is that when it does come to funding that we do a better job.

If you don't have legal rights, then you don't have any of the rights at all. If you can't make the system work, then you are not really a citizen. And I think it is definitely a problem that any reform of legal services that seems to be restrictions, then people are going to look at it and think that this is even getting legal representation away from the 20 percent that are receiving it now.

I do have two questions. Since you have already excused yourself because you are not a lawyer, I will address them to Bill because I know he is a lawyer.

Mr. MCCOLLUM. Thank you. I can't have an excuse? OK.

Mr. STENHOLM. He is my attorney.

Mr. STAGGERS. The American Bar Association, they mention on page 8 of their prepared statement that sufficient authority already exists to protect LSC grant funds from theft and fraudulent use and that local programs have been diligent in overseeing those funds. Would you care to comment on that?

Mr. MCCOLLUM. Yes, I would be very glad to comment on it. There is, I suppose, a dispute of opinion between certain people and parties involved. I understand that the in-house counsel at Legal Services Corporation believes that coverage already exists. The problem is that the U.S. attorneys in the field, at least in a couple of instances, do not agree with that.

And, frankly, if the U.S. attorneys out there who are in charge of enforcing the law don't believe they have got the authority, then it seems to me it is incumbent upon us in Congress to clarify any doubt that is there, and it is a very simple procedure to do that. So to me there should be no excuse for not putting it in, and I think the chairman probably indicated this in what he was saying a minute ago. I don't have any argument about how you do it, but just that it is done so it is very clear.

Mr. STAGGERS. The second question, then I will yield back my time. One of the problems I had with last year's amendment was antisolicitation proposals, and the ABA also mentions that. Are you all willing to compromise on that? Can you see different language or a different approach?

Mr. MCCOLLUM. I think what Mr. Stenholm said was very applicable to us. We are open-minded about this. We are not set in stone. I have no preconceived notions. It is just that the problem is so grave. They are running around and collecting folks to fill these suits and then, as you have heard from the statement he gave of the example, and I have had similar ones, and perhaps you have had too, there seems to be a big problem with the listing by these legal services lawyers, of the people they have solicited out of a pool. Maybe there are 3,000 farmworkers out there in a pool somewhere and there is no rhyme or reason as to how they get onto the list, except that they apparently have gone out and solicited them.

In other words, the farmers' time and again don't have any records, nor do their handlers, of these particular people working for them who are listed in the suit. Our idea on solicitation is to try to get some sense into that process. But if there are better ideas, we are very—at least I am very open to it.

Mr. STENHOLM. May I respond, Mr. Staggers, too on that point?

Mr. STAGGERS. Yes, sir.

Mr. STENHOLM. We have made some changes in our language that we think will be a little more amenable to those that have objected to the earlier language.

But I am struck by the irony of the previous statement just made, that we are serving only 20 percent of the poor people right now but yet one of the controversies of this whole issue is that we want to prohibit solicitation. There is a certain irony about that that kind of bothers me.

Mr. STAGGERS. Well, I guess my question is that if, in fact, there are a group of people that are totally ignorant, whether it is the 20 percent already receiving it or the 80 percent that are not receiving it, part of the problem would be letting these people know that they have a right to legal representation, and that would be the concern I would have. A total ban on that, of providing information, that would be the concern I would have.

Mr. MCCOLLUM. If I might respond to that, I would say, you know, I don't think either one of us would object to Legal Services tacking up a poster on the wall somewhere saying, "We represent you, if you've got a problem come see us." We also would object to a legal services lawyer going out to a meeting of the farmworkers just to announce that they are there, that they are available.

But to have them go out into the field and try to find enough people to make up a class action suit and go from one to another

for a particular cause, for a particular issue, that is what is disturbing to us. However this could be crafted so that we could stop that process, that is what we are about.

Mr. STAGGERS. Thank you. Thank you, Mr. Chairman.

Mr. FRANK. Thank you, Mr. Staggers, and I appreciate you coming. We are moving on this bill as quickly as it is possible to move, given—as a matter of fact, the hearings were delayed 1 week at the request of Legal Services Corporation. Because we were going to have the second of these hearings next Wednesday, and the Legal Services Corporation is having its first meeting, I guess, of the new board or a second meeting of the new board a week after that, and they asked if we would delay their hearing a week because they weren't ready and that delay was at their request. This came as soon as our decks were cleared.

[The prepared statement of Mr. Stenholm follows:]

Testimony of
Congressman Charles Stenholm
on
REAUTHORIZATION of the LEGAL SERVICES ACT

Before the
Subcommittee on Administrative Law & Governmental Relations
May 9, 1990

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to exchange some ideas on possible reforms to be included in your reauthorization of the Legal Services Act. I commend you, Mr. Chairman, for holding these hearings on this issue, and I would like to express my strongest possible support and encouragement for moving forward with a reauthorization bill.

As you know, I am here to speak in behalf of reforms to Legal Services such as were included in an amendment Bill McCollum and I offered last October through the appropriations process. As I will mention later on, we believe there can be some improvements to the reforms we offered last year, but we continue to support the basic principles included in that amendment.

LEGAL SERVICES REFORM, NOT REPEAL

Before I say anything else, I want to reiterate something which I tried to make perfectly clear on the House Floor last Fall. I believe in Legal Services. I know some people continue to cast aspersions on my truthfulness when I say that. I don't know what else I can do but sit here and look each of you in the eye, Member to Member, and say that I believe in Legal Services. I hope that my credibility is such that if you hear something contrary about my intentions from other folks, it will be their, and not my, assertions that are questioned.

I believe that the majority of Legal Services attorneys are

providing the eervices that Congrese intended back in the early '70s. I believe that legal representation for the poor is vital in our American system and I feel that much good is being accomplished today by many LSC attorneys.

That's why I do not support abolishing the LSC, as eome do and, I will admit, I did when I first came to Congress. The fact that I have come to be so convinced in the importance of Legal Services for the poor ie why I am committed to seeing eome reforms enacted. It is my impreseion that the inappropriate activitiee of a fraction of LSC atorneys are, in effect, etealing money for the pureuit of a political agenda, rather than meeting the genuine day-to-day legal needs of poor folks.

When one hears that Legal Service grantees developed and distributed brochuree such as The Law and Direct Citizen Action which talks about organizing for social change and training citizene in "etrategiee and tactics based on polarization and confrontation," it raiees some eerious concern. When one knows about publications, a copy of which I poeeees, developed specifically to teach Legal Service attorneye how to circumvent their local boards of directore, the reality of local control under the current system becomes suepect. And in one citizen's letter to me last year, I wae etartled to read "One Texas LSC attorney told a group of growers that she was there to redistribute wealth and that in a revolution some people get hurt. Interestingly, her office has pictures of outetanding democrats like the [recent Marxiet] leadere of Nicaragua instead of our government officiale just in case we need reminders of where their movement would take us."

These examples help explain why I believe LSC reforms are warranted.

WEST TEXAS TRACTOR SEAT COMMON SENSE

This committee knows, and I readily acknowledge, that since I do not have the privilege of sitting on this panel, I do not have the historical memory and the intimate knowledge of the Legal Services program which many of you have. I would never pretend to posess your expertise in the field. In fact, unlike the majority of my colleagues, I don't even come to you as an attorney. Most of you know that I am a farmer by background, and to help support my farming habit, I am a teacher by training.

That lack of a legal background puts me somewhat at a disadvantage when I'm dealing with all of you attorney-types. On the other hand, it may give me a little bit of an advantage. By not being so much a part of the legal process, it may be that I can remove myself a bit and, as they say, see the forest for the trees.

The people in my part of the Country talk about a thing called West-Texas-tractor-seat-common-sense, and that's the perspective from which I come to the Legal Services issue. I don't have the legal background but I do see some things which, to the average layman, just don't seem to make West Texas common sense, and they bother me.

To avoid being called a Texas chauvinist, I'd like to quote our colleague Chet Atkins, who recently expressed a similar feeling. Explaining his frustration and anger over Legal Service attorneys representing drug dealers whom housing authorities had attempted to evict -- an eviction which, incidentally, was being demanded by fellow housing residents -- Chet had this to say: "Legal Services' use of taxpayer money to protect drug dealers destroys the public's faith

that the government acts with a modicum of common sense and doesn't follow every nutbag extremist philosophy." Despite the fact that Chet and I, not to mention Texas and Massachusetts, are rarely paired as ideological kindred spirits, in this case, Chet and I are talking the same language.

Things like waste, fraud and abuse provisions seem so common-sense to me that it's hard for me to understand why they're considered controversial. The fact that a legal service attorney in my District, during regular working hours, is staffing a campaign office seems so blatantly wrong that I can't see why a prohibition on political and redistricting activity is questioned. Something like timekeeping, which every other attorney in the Country must do if he or she expects to get paid, seems so basic that I can't figure the problem with requiring it. It doesn't seem to me that just because the payor in this case happens to be the U.S. Taxpayer, there's any less reason to keep time and know how our money is being spent.

I recognize that some of the other provisions in the reforms we have offered are a little more complicated than that. In fact, I recognize that the issue which more than any other got me involved in Legal Services reform -- that being the role some Legal Services attorneys are taking against agriculture producers -- that issue is one of the more legally complicated provisions of the amendment. Let me assure you that in no way do I want to see the law biased against farm workers. I suspect that abuses by a small number of producers do occur and I want those related farm workers to have access to Legal Service attorneys. But likewise, I don't want to see Legal Services biased against producers, and from the accounts I've heard, I believe

we have a problem which needs to be corrected.

1990 REFORMS

As you know, the track which Bill McCollum and I have tried to pursue has been to redirect the LSC back toward what we underetand Congrese' intentions for Legal Servicee to be: aesisting poor pereons in their day-to-day legal needs. Last October we offered our Amendment to the relevant appropriatione bill becauee that was our only opportunity to put theee reforms to a vote. The fact that the reform amendment narrowly failed by seven votes, even though we had very little time to try to educate other Members on our amendment, suggeete to me that other Members have eome eimilar concerns and would like to see some remedy.

We feel that ae you are coneidering thie reauthorization bill, it would be helpful to focus on two goals for Legal Services: improved accountabilty and greater local direction. My sincere belief is that by enacting these reforms and caueing Legal Services attorneys to act more like other attorneye, the image of the Legal Service lawyer will actually be enhanced, along with the program being improved.

Speaking more epecifically, we would like to suggeet that these two goale would be eupported by enacting the following reforms:

1)a prohibition of redietricting activitiee by Legal Service attorneys;

2)application of exieting federal waete, fraud and abuse provieions to Legal Servicee programs;

3)reforms of acceptable activitiee by LSC attorneys in farm worker/producer caees;

4)timekeeping requirements;

5)greater authority to Legal Services local program boards of

directors;

6)regulation of private funds; and

7)earmarking of funds for child support and drug cases.

AGRICULTURE REFORMS

As I mentioned earlier, my background gives me a particular sensitivity to the reform related to ag workers and producers. To give you a feel for the kind of anecdote which has motivated me, I would like to read to you a paragraph from a letter sent to me by one ag producer.

> We seem to continually be subject to one or two harassment or new precedent setting lawsuits despite our best efforts to be good and fair above average farm labor employers. Currently we are working toward settlement over wage payments and MSWAPA [Migrant & Seasonal Workers] violations on employees that never, we believe, worked for either us or our labor contractor. We survived wage and housing scrutiny during the seasons and yet two years later without any notification we are sent a copy of a suit filed against us by a group of people who claim they worked for us and were not properly paid. Naturally they claim record keeping violations because how can we have payroll records on people who didn't work? Why did it take two years for a group to "remember" they worked and were not paid?. . .We will be forced to take the "rational" choice and settle $70,000 worth of allegations. . .The big lesson we learned was not to operate where legal services is militant.

Obviously, this farmer was in a Catch-22 situation where he was going to lose money no matter what happened. While neither the plaintiff nor the Legal Services attorney could possibly lose money, the producer was guaranteed a financial loss, no matter what course of action he chose.

A related example was brought to the House Floor by our colleague Tim Valentine last year. Tim, who had first-hand knowledge of these cases because he helped constituents draft their responses, said that letters from Legal Services attorneys "said in effect that, 'I

represent a person who has worked for you, and you have violated his or her rights,' without naming the individual or without giving enough particulars for that farmer to be able to form any judgment even as to whether or not the person had ever been employed by him. The letters would say, 'If you will send us $5,000 or $3,000, we will end the matter. If you don't pay us, we are going to sue you." As Tim pointed out, unsubstantiated, vague accusations of alledged wrong-doing attached to demands for payment usually get called "extortion" where I come from.

Naturally, I understand that somebody else is going to have a different side to those stories and I certainly don't presume to take the role which rightly belongs to the courts in such matters. However, it seems clear to me that things like solicitation of clients, no requirements for mediation or administrative remedy, and no requirement to identify plaintiffs, create an environment where abuse can abound. It is possible for us to craft a law where growers who deserve to be sued because they exploit their workers are, in fact, sued without innocent producers being harassed and financially devastated.

REFORM SUGGESTIONS

Bill and I felt that there were some valid criticisms against our amendment last year, and so we are incorporating some changes which we believe are improvements in what we are recommending to you today.

One area in which we have taken a particularly good hard look is the recommendation relating to the agriculture workers and producers. Using our previous language as a beginning point, we believe the agriculture provision might be improved by:

a)providing a choice between exhausting administrative remedies

or making a good faith effort to use alternative dispute resolution;

b)removing the words "any and all" from the requirement of exhausting administrative remedies;

c)making ths requirement of identifying the plaintiff compatible with the requirement contained in the Federal Rules of Civil Procedurs which all other attorneys follow;

d)allowing the court to omit a plaintiff's name; and

e)removing the requirement that an affidavit be filed with ths complaint.

INPUT FROM OTHERS

As I just msntioned, Bill and I are reworking our recommendations because we have kept an open mind to the feedback ws have received from others. Bill, for example, is meeting this week with repressntatives from the American Bar Association. Similarly, I wanted to let you know that I have mads a point of meeting with the Legal Servics attorneys in my own Congressional District, and that ths meetings I have had with them are always very amicable. As I said earlier, I believs that the majority of LSC attorneys ars performing a valuable ssrvics in a commendable manner, and that certainly is the impression I have of the LSC folks in my District. When my constituents contact ms with legal problems, I frequently havs cause to refsr thoss constitusnts to Legal Services and I nevsr have reservation in doing so.

So, my point is that ws havs valued the input ws recsived as a result of our amendment last ysar and we ars happy to pass along thoss recommendations to you.

AUTHORIZATION RATHER THAN APPROPRIATION

Finally, I want to give you every reassurance that I am eager to work through the committee authorization process rather than the appropriations process for trying to enact these reforms. I have always made it clear that I am uncomfortable with authorization-type language on an appropriations bill and that is not my preferred way of doing business.

I am delighted that you, Mr. Chairman, scheduled these authorization hearings and that you have taken time to hear from us today. My fond hope is that the reauthorization process will be completed this year and we will be voting on Legal Services on the Floor later this year. I also have particularly appreciated the interest which our colleague, Harley Staggers, has taken in this issue. I look forward to working with this committee in any way I can to be helpful to the process.

# # # #

Mr. FRANK. Mr. Smith.

Mr. SMITH of Texas. Thank you, Mr. Chairman. Mr. Chairman, I want to thank our colleagues, Bill McCollum and Charley Stenholm, for taking the time to appear before us this morning and testifying on a subject that they, obviously, feel so strongly about. I would like to point out that both Bill McCollum and Charley Stenholm speak from firsthand experience. They are knowledgeable about this subject. They have talked to individuals who have, unfortunately, experienced the abuses of their Legal Services Corporation attorneys and I think they bring a great deal of credibility as well as conviction to us today.

Let me also say in passing that both individuals in the short time that I have been here brought out points that I happen to agree with. Charley Stenholm just mentioned the statistic that only 20 percent of the individuals that need this type of legal aid are actually being served, which leaves a big pool of individuals that I think should be thought of as potential clients rather than the attorneys taking the time to start class action suits that may or may not be helping those particular individuals.

And Bill McCollum just mentioned the idea that Legal Services Corporation could put up posters rather than going out to the field and soliciting clients. I might also add that, Bill, as I understand it, that is against the standards of ethics of the American Bar Association, to go out and solicit clients in that kind of situation; is it not?

Mr. MCCOLLUM. Well, I as a practicing lawyer always thought real true solicitation was, but somehow they are going out there and doing this, and getting individual names on this list. And, you know, I just think that it doesn't hurt us to put some explicit statutory prohibition in there that is enforceable not just by the canons of ethics, but enforceable by the Corporation boards around the country, locally and the national board.

Mr. SMITH of Texas. Mr. Chairman, I think our colleagues have made very constructive suggestions for reforming the Legal Services Corporation and, obviously, they are willing to talk and to negotiate and come up with a solution, which I think is important as well.

On another subject, Mr. Chairman, I would like unanimous consent to have made a part of the record a statement by another colleague of ours, Larry Combest, who could not be with us this morning.

Mr. FRANK. Without objection, so ordered.

Mr. SMITH of Texas. Thank you, Mr. Chairman. I don't have any other comments.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Combest follows:]

PREPARED STATEMENT OF HON. LARRY COMBEST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairmen, I eppreciete the opportunity to offer teetimony todey regarding the need for reform in the Legal Servicee Corporetion (LSC). I am hopeful thet my viewe end those of my colleeguee who support the reform initietive will be better underetood end epprecieted ee e result of theee heerings.

The poor and lower income people of this country heve e real need for legel help. Whet I edvocete end whet ie included in my bill, H.R. 2884, which ie pending before this eubcommittee, ere long overdue reforms thet will help eneure thet legel eervicee are being delivered to the needy end at the eame time keep grantees from ueing unfair tectics againet defendente.

Apparent ebusive practicee were first brought to my ettention by my conetituente. Within weeke from the time I wee first elected to the House in 1984, I received a copy of e petition signed by approximately three thoueend citizene of Hereford, en egriculturel community of 16,000 in the Texee Penhendle. The petition, proteeting the actione of the local Legel Servicee Corporation grentee, wee elso sent to the president of the Legel Servicee Corporation. In December of 1985, locel officiele there eetimated thet, et thet time, $4 million and four hundred jobe had been lost due to the ectione of the LSC grentee.

Thie impreeeive outpouring of sentiment regarding the LSC caught my ettention. Since then numeroue conetituents have contected me regarding the actione of the LSC in my dietrict.

In eome cesee, there is no doubt that defendente heve clearly been guilty of what they were accueed. The guilty should be punished end I would not ergue otherwiee.

But many timee it appeare that en LSC grantee hes overetepped the bonds of reason in pursuing a caee. For example: they might mieepply agriculturel minimum wage lawe in accueing growere of violstions; they would commonly eccuee defendants without identifying eccueers; and, in one instance, apperently ieeued preee releaeee end poeted fliere accueing a grower of eafety violations, even though no caee hsd been brought againet him.

My concerne are the concerne of my conetituents who heve contected me regerding LSC abuees. They eimply want to be free from unwerranted sttacks upon themeelves and their livelihood by an uncontrolled entity of the federal government. They eimply cennot metch the reeourcee of the United States government in pureuing these caeee end often have to meke expeneive eettlemente or go broke proving their innocence.

I was sent hsrs by my constitusnts to rsprssснt thsm, snd ss a rssult of the numsrous complsints thst I continue to receivs, I bslisvs Congrsss must tske s ssrious look at the LSC and its grsnteea. Ths LSC is s pseudo-governmsntsl sntity thst snjoys fsdsrsl funding of mors thsn $300 million s yssr, but is frss from essentisl monitoring snd controls on how that monsy should bs spsnt. In rssponas, I introducsd H.R. 2884, a bill which completely rssuthorizss ths Legsl Services Corporation.

My bill doss not sbolish ths LSC, but makss clssr whst it can snd csnnot do. I bslisvs it is true to ths original intent of the Lsgsl Ssrvicsa Corporstion Act. Ths bottom lins is that the citizsna of ths country ahould hsve control ovsr ths sctions of this, snd sll, fsdsrsl sgsnciss. This is aa true for the Departmsnt of Dsfsnae ss it is for ths Lsgsl Ssrvices Corporstion. As long as ths taxpsysrs ars funding sn sgsncy, thsn they should be sbls to sst ths guidslinss on how their monsy shsll bs ussd. In my view, anyone not agresing with hslting sbuss must bs profiting from it.

As s Msmbsr of the Houss of Rsprssentstivss I havs nsvsr hsd ths opportunity to vots on sn suthorization bill for ths LSC. Ths only opportunities thst thoss of us who support rsforms for the LSC havs hsd to sxprssa thsss concsrns hsvs besn during considerstion of sppropristions bills. Thia ususlly limitsd us

to offering amendments to cut funding. This was the only way we could attempt to have an impact.

The House came very close to passing some needed reforms in last year's Commerce-Justice-State appropriations bill. I commend the efforts of my colleagues, Representatives Charles Stenholm and Bill McCollum, in this bipartisan effort. I am confident that the House will approve some measure of reforms in the future. But let us begin here and now to start the process, instead of waiting to wage a bitter battle on the House Floor in some future appropriations bill.

We now enter a new period in this debate, one which I hope will be marked by cooperation rather than confrontation. My bill authorizes a new Legal Services Administration -- it does not discard the intent of the original LSC act. There is no question that reforms are needed. The question is: will the status quo prevail?

The poor must be helped, but no one is served when the rights of people are trampled in the pursuit of this cause. I offer my bill, H.R. 2884, as a starting point for bringing needed reforms to the Legal Services Corporation. This legislation provides the basis for a new Legal Services Administration, one that targets its resources towards the needy, respects the rights of

defendants, and exhibits responsibility to the taxpayers of this country.

Mr. Chairman, I commend you for holding these hearings and I hope that they result in a authorization bill that includes necessary reforms for the Legal Services Corporation.

Mr. FRANK. Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman. I would like to ask our two colleagues a couple of questions.

First, let me start by saying I believe, and I only speak for myself, that the reason, perhaps, that some of the notions that you put forward may be controversial to some is I think best stated by you, Charley, when you said that when you first came to the Congress you opposed the Legal Services Corporation. And, although I certainly recognize that you have changed, as I take you at your word, others may feel, obviously without foundation, that you have changed your tactics. That you are trying to do indirectly what you found that you couldn't do directly. So it may be viewed with some suspicion as a result of that, and, of course, there is nothing you can do about that but continue to press on.

But, if I start out by saying that my express intention is to paint that wall red and I am not able to accomplish it, and then I come back next year and I have a can of blue paint, you may be suspicious that I am trying to somehow get from blue eventually to red. You understand the point that I am trying to make.

Let me start with some threshold considerations. In your remarks, on page 5 near the top, you say that Congress' intention for Legal Services was to be assisting poor people in their day-to-day legal needs. And then further, in the middle of the page, you said: My sincere belief is that by enacting these reforms—those that you spoke of above—and "causing Legal Services attorneys to act more like other attorneys," let us rejoin at that point.

Both of you mentioned redistricting, for instance. That you feel that poor people don't have a stake or shouldn't have a voice in redistricting. If not, why not? And, if so, who will represent them?

Mr. MCCOLLUM. I would be very glad to respond. First of all, I would like to make a comment. No takeoff on my colleague over here, but Bill McCollum came to Congress in 1980, same class as the chairman. President Reagan wanted to abolish Legal Services Corporation and I opposed that. I voted against that. I preferred reform, and I voted against cutting money for Legal Services. So I just think the record needs to be clear.

I think Charley has seen the light. I am convinced that he has about this. We have been working on this a long time. So I don't think that should really be a question.

Second, with regard to the redistricting.

Mr. WASHINGTON. No, it wasn't a question. I was answering—excuse me.

Mr. MCCOLLUM. You asked about redistricting. I am sorry.

Mr. WASHINGTON. I answered the question that he asked. I wasn't posing it. I think he knows me well enough to know if those were my intentions I would have said so.

Mr. MCCOLLUM. With all due respect, I understood that. I just wanted to put it on the record for myself as well.

Mr. WASHINGTON. Yes.

Mr. MCCOLLUM. And I took that opportunity and liberty from you.

On redistricting we think historically, Legal Services Corporation from its inception for whatever reason had a group of attorneys getting involved with the process who, quite frankly, felt that it

was more important to try to change social policy to alleviate poverty in general in this country and to do broad, sweeping litigation that was necessary and get involved with redistricting and things like that than it was to represent day-to-day problems, and I know that for a personal fact. I served on a Legal Services board of sorts in Florida, the old volunteer type. Orlando still has one of the premiere programs in the Nation.

I remember calling the Legal Services when they were going to come to town, and we were told, "Well, you know, we can't join together." I thought merging was a good idea. I was on the board of directors of the bar association. I said, "Well, why do we need to have two of these? Let's just have one and we will all be one big happy family." To the lawyer in charge of the Legal Services field programs, from Atlanta, who had the whole Southeast region, I said, "There's nothing here that keeps that from happening. I hear you won't let that happen. I don't understand that."

He said: "Mr. McCollum, you don't understand. Our lawyers are not interested in what your local lawyers would be. We don't want our lawyers out there involved in landlord-tenant problems, in auto repossession cases, and in domestic dispute cases. We want our lawyers out there involved in changing the course of poverty law in this country."

So, to answer your question, I think with the limited resources we have—I thought he was wrong then and I think he is wrong now—that we ought to be devoting the resources to the purposes of the individual cases, the landlord-tenants, the car repossessions, the disputes, and, frankly, getting away from the political part which has hurt this organization, such as lobbying, redistricting, that sort of thing.

Mr. WASHINGTON. Who then represents—if you believe that the poor people have an equal stake, as I do, in redistricting, who then represents them?

Mr. MCCOLLUM. Well, I think they are represented by their elected legislators. That is what the redistricting is all about.

Mr. WASHINGTON. I mean in the judicial system. To the extent that from time to time it becomes necessary for redistricting battles to be fought in court, and most people would agree that when you go to court you are better served if you have a lawyer representing you, who then would represent—under your scenario, who would represent the interests of poor people when they get to court?

Mr. MCCOLLUM. I don't see the need for them to be represented in this capacity in court. I don't see the need for litigation for the poor people as such, as an independent class of people in court. I think that if there are going to be redistricting battles there is going to be a lot of people that aren't poor people involved as well. There is going to be a lot of battles going on, but generally speaking it is not going to be the civil suit type of battle that determines redistricting, in my judgment.

Mr. WASHINGTON. You know, of course, that any other person with means that thinks that they have a perceived interest can at least hire an attorney and have that lawyer attempt to intervene in any existing or proposed litigation on redistricting.

Mr. MCCOLLUM. In my judgment, it is a matter of priorities and it is a matter of where do you want to spend your resources and how do you protect this corporation from the political arena which is going to I think in the long run keep it from getting the proper funding and doing the job as intended. So it is a balance act. You may be partially correct, but I think that they won't have representation to the degree that you might like. But I think that it is the way to go.

Mr. WASHINGTON. So it is a policy judgment?

Mr. MCCOLLUM. It is a policy judgment; yes, sir.

Mr. WASHINGTON. Would you then concomitantly prohibit anyone else from hiring a lawyer and getting involved in a redistricting suit?

Mr. MCCOLLUM. Well, we don't have Federal moneys going out there. We are not talking about prohibiting anybody from doing something. We are talking about prohibiting Federal moneys from going to lawyers for this particular purpose.

Besides, you can have pro bono work still, and the Legal Aid Society in Orange County, FL, still exists to represent the poor. And I suspect in many parts of the country that is still true today. However, we provided legal services to try to fill gaps, and I think that is what they are out there doing, filling gaps.

Mr. WASHINGTON. Would you agree with me that as it comes to reapportionment that all citizens have an equal stake in that——

Mr. MCCOLLUM. Sure.

Mr. WASHINGTON [continuing]. Ensuring that it is done properly?

Mr. MCCOLLUM. Sure.

Mr. WASHINGTON. And I would agree with you that ab initio those who are elected to represent all people would have that responsibility. I don't know how it is in Florida, but in Texas we sometimes don't come to an agreement on redistricting and, unfortunately, these matters end up in court. And I think it would be a sorry state of affairs if only the people with means had representation when everyone has an equal stake at the courthouse. Would you disagree with that?

Mr. MCCOLLUM. Well, I don't disagree with the principle. I disagree with this in the case of Legal Services Corporation. I just don't think that Legal Services lawyers ought to be involved.

Now, you said is it a policy decision? Yes, that is what it is. I am not saying that poor people should be excluded from the courtroom. I am just saying to you that I don't believe the resources of the Federal Government, as limited as they are in this area, ought to be used for that purpose. I think it is counterproductive. I think it politicizes Legal Services. And I think you have to draw a line somewhere, just as I don't think all class action suits ought to be brought by Legal Services lawyers. That is all.

Mr. Stenholm, I think, wants to respond, if he could.

Mr. STENHOLM. Mr. Washington, let me first say, yes, I believe that poor people need to be represented. But I seriously question whether a class action suit on behalf of poor people in redistricting or in political matters is a justifiable use of Legal Services funds. I doubt seriously that there is any congressional district now or one which could be created in the United States—I could be corrected on this, but I will make the statement—of which the majority of

the people within the district would be poor and unable to hire legal representation at the bar or in the court when a question that you have just stated would come up.

I equate an answer to you as the same quandary or difficulty that I have found myself concerning the National Endowment for the Arts. I support the National Endowment.

Mr. FRANK. Mr. Stenholm, could we not get into that now because we have a time problem?

Mr. STENHOLM. Yes. Well, very quickly, I would just make a quick point, Mr. Chairman. It is that political sensitivities of the majority tend to damage the program as a whole. I would ask you why you feel it is so necessary to have Legal Services involved in the political process in the redistricting question when we have 80 percent of the poor people that cannot get the help that they need in day-to-day legal activities. We have to prioritize.

My suggestion is we can handle redistricting better through you and I working through the political process in our party. We don't have to have public funding going to an agenda of which you may agree or I may agree or we may both disagree. That is my point.

Mr. WASHINGTON. My problem with that is that our history teaches us, sir, that prior to the advent of Legal Services getting involved no one represented the poor people at the courthouse, and I fear that if we don't allow access by all people—the law says that neither the rich man nor the poor man may sleep under the bridge. Of course, the rich man doesn't need to sleep under the bridge. The rich man can hire any lawyer that he wishes, and if we start to limit the right of poor people by picking and choosing when they may have legal representation and when they may not have legal representation, then we are effectively determining whether to have representation at all.

Mr. FRANK. May I ask the indulgence of my colleagues? I think we are into what is a healthy debate which we will all have the privilege of dealing with later. So, if we could move on to other areas and then we will get back into this in a general debate thing.

Mr. WASHINGTON. I beg the chairman's indulgence. Mine was a question. I was responding out of courtesy to a colleague.

Mr. FRANK. I understand.

Mr. WASHINGTON. I ask questions.

Mr. FRANK. Yes, I appreciate that. When it comes between courtesy and speed, I also go for speed.

[Laughter.]

Mr. WASHINGTON. Let me ask my question hurriedly then.

Mr. FRANK. Please.

Mr. WASHINGTON. On the question of solicitation, and I am new to the committee and I am new to whatever time limits he imposes or doesn't impose, and so for all of those frailties, human frailties, I apologize. But I am here to get information because I want to do the right thing. That is why I came to Congress, as did you.

On the question of solicitation, I think it is important if it is the case, and I certainly don't know whether it is down in Florida, Bill, to draw a distinction between prelitigation and postlitigation. Because as a lawyer you very well know that you would be guilty of malpractice if you had alleged a class and you didn't attempt to go

out and find whether the persons who existed out in the community may be members of the class or not.

So it is a difficult question, Charley, is what I am trying to suggest. For instance, a group of people come to my office. They work for XYZ Corp. Let's take it out of the agricultural field. They work on the docks. They raise complaints which I as a lawyer believe may be the subject of class action litigation. So most lawyers, especially in Federal court since you only get one chance to replead—most lawyers would err on the side of including an allegation of class action if you had 9 or 10 people to come in, rather than excluding it and attempting to discover whether there was enough people and attempting to amend the complaint, because you may be outside the period in which you could amend your complaint. Because there are rules in Federal court that, if you have later discovered that there are 10,000 people similarly situated, rather than this 9, you may be cut off from amending your complaint to allege a class action, which means you have to file another case, which nobody likes.

The point is I think it is important, and I don't know enough and I am really asking whether the solicitation that you have heard of has been, after litigation has been filed and a class action complaint has been made, because if that is the case then I would suggest to you then that is not solicitation, that is a good lawyer doing his or her job to make sure that you can prove up the class allegation or not.

Mr. MCCOLLUM. If I might respond, it is before in the cases I know of, and I know of three personally. I won't try to represent all of the others——

Mr. JAMES. Would the gentleman yield a minute?

Mr. MCCOLLUM. Be glad to yield.

Mr. JAMES. What bothers me about it, I understand your point about the poor being represented, but I just wanted to take an opportunity to point out that neither are the middle class nor the well-off represented in those issues, because that type of suit is too expensive for any other than the very top one-half percent of the wealthy. You might as well make the argument that everyone is entitled to a new car every year. Even those people who could afford a new car every year couldn't afford that kind of suit. So to say that only the poor aren't represented isn't true. A vast majority of us could not afford that kind of suit.

And that is not what Legal Services is for. Some redistricting suits would take $300 million, that is our entire budget in our State. That is the difference, I think.

Mr. WASHINGTON. That went over my head.

Mr. JAMES. Thank you. Yield back.

Mr. WASHINGTON. That went right over my head. But go ahead with the answer to the question that I asked you.

Mr. MCCOLLUM. The only answer was that in the three cases I was aware of, personally brought to my attention, it was before the fact, and I think that was the comment I meant when I said that is fine if Legal Services Corporation lawyers want to go out and let the agricultural worker community be aware that they exist and that they can provide services if they come in and this spreads by

word of mouth. But to go out and drum up a case, I don't believe they ought to do that.

Mr. WASHINGTON. In other words, in response to my question you are suggesting that the circumstances are where there was no cause of action that the lawyer knew of to begin with. In other words, the lawyer was not following up on whether there were enough, a sufficient number of people to form a class, but trying to find out whether there were people who wanted to be plaintiffs in a lawsuit, and that is solicitation.

Mr. MCCOLLUM. That is my opinion. Of course, it is subject to each case individually being reviewed and scrutinized. And I was not involved in the case. I want to put in all of those disclaimers, Mr. Washington, because you and I both having been practicing lawyers know that what is brought to us at this stage is not necessarily the whole story, but that is my understanding from what was presented to me, and I would interpret that as solicitation. I don't think it ought to be. That is all.

Mr. WASHINGTON. Would it be possible to make that a part of the record?

Mr. MCCOLLUM. I don't have documentation of those cases. This has been over the years for 10 years.

Mr. FRANK. Let me follow up, though, on what Mr. Washington said. I would appreciate it, and I want to emphasize what he said. To the extent that we have got any of these reports and as fully as they can be reported to us, it would be helpful to us.

Mr. WASHINGTON. Yes.

Mr. MCCOLLUM. Sure. We may get some witnesses for you, Mr. Chairman. We might be able to drag some witnesses in here for you.

Mr. FRANK. Yes. Well, let me say this. There are two things. It doesn't necessarily have to be in the printed record, but if there is information that could be made available, we will circulate it among members of the subcommittee. That will help us when we sit down to mark up to have, actually, some of these cases. So I would like to make that as a general request.

Mr. WASHINGTON. Yes. That is my only point and my final point. That if we can determine that there is a good deal of this going on, I think that there is a way that that kind of misconduct can be written in without at the same time, if you will, to use a trite, overused expression, throwing the baby out with the bath water, you know. If the lawyer has interviewed persons whom he or she has accepted as a client, and in furtherance of a determination as to whether there is a class action, that is one category. But if they are out because they think that this would make a good lawsuit, and these people live over here where there may be some toxic waste on the ground and they are going out drumming up people to be plaintiffs, that is altogether different and we can write a rule that covers that.

Mr. FRANK. And it would help us to have a set of facts.

Mr. MCCOLLUM. I understand.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Mr. FRANK. Before I turn to Mr. Douglas, Mr. McCollum, just two factual questions. You mentioned somebody from Atlanta who

worked for the corporation who told you that his purpose was not to do landlord-tenant.

Mr. MCCOLLUM. That was back in 1978-79, something like that.

Mr. FRANK. Is that individual still in that position?

Mr. MCCOLLUM. I have no idea today.

Mr. FRANK. The only point I would make is that I think a lot has changed for the better since 1978.

Mr. MCCOLLUM. I certainly hope so. My impression is it has improved some, but some of those lawyers are still around, unfortunately.

Mr. FRANK. I appreciate that. I just wanted it to be clear that we are not talking about somebody that we know to be at least contemporary.

Mr. Douglas.

Mr. DOUGLAS. Well, given your twin pillars of speed and courtesy, I just wanted to first apologize to John Ross, who will be testifying. I have got two other hearings and you will hear from one of my good friends in the New Hampshire Bar. I think John has a point about the competition aspect.

And, as far as speed, I don't have any questions, other than I want to say I will look at your bill and I think some reforms are needed, especially in the area of redistricting. That concerns me a lot.

But I have two other hearings, Mr. Chairman, so I am going to take my homework and I hope to be back. I have got to go learn a little more about the IRS mismanagement.

Mr. FRANK. Thank you. Your own extensive legal experience is something we are going to be drawing on, so we appreciate that.

Mr. James had another supplementary question.

Mr. JAMES. Maybe I was confusing last time, Mr. Washington, when you said it went over your head. What I am suggesting and submitting is simply this: Yes, I want the poor to have representation. But in this scenario, as far as political representation in a suit, what you are submitting if you isolate them as poor is to give them a superior representation to what 99.9 percent of us could afford in the first place.

So it is not just the poor that are excluded from having the capacity to file a class action. Very few Congressmen with their salary could ever afford to pay an attorney for an adequate class action suit. You would have to be very, very wealthy. They are very expensive lawsuits, just for the purposes of the expert testimony.

Thank you very much.

Mr. FRANK. I thank you. Although some of us might think about a class action defamation suit, if we all kicked in a little bit we would probably have enough defendants that we could pick.

I want to thank my colleagues. We will be seeing more of each other because this is a subject on which all of us are quite serious.

Mr. MCCOLLUM. Thank you.

Mr. STENHOLM. Thank you, Mr. Chairman.

Mr. FRANK. Our next colleague, Mr. Cardin, is deferring to his colleague Ms. Byron he has just indicated to me, and I appreciate that.

He just wants to be able to rebut everything you say, Bev. Don't be fooled.

Ms. BYRON. Absolutely. And I will be gone.

Mr. FRANK. I understand that you have other obligations. Thank you for for—often Members of Congress testify in a somewhat pro forma way. This happens to be an issue on which a lot of members have done a lot of work, care a lot, it is an important subject, and so I hope people will be favorably impressed, rather than feeling put out, by the fact that so many of our colleagues want to be involved in this.

STATEMENT OF HON. BEVERLY B. BYRON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Ms. BYRON. Mr. Chairman, let me say, first of all, I will take your word and will be quick, short and brief, and I will take no questions because I am going to be gone in 3 minutes.

Let me, first of all, thank you for the opportunity to testify before your subcommittee. As you know, I have been here before and I want to make it clear again that I don't object to publicly funded Legal Services Corporation. I find it extremely important and legal counsel shouldn't be contingent on who can pay for it.

However—and I am going to get to Congressman Washington's point in just a moment—I have been concerned in the past when it seems to be overzealous actions by Legal Services to prosecute individuals who are not capable financially of defending themselves over and over and over again. Specifically, I am speaking of the action that was taken, and we all know what is closest to us, and that in my case is the fruitgrowers of western Maryland.

As I have testified in the past, these were not charges of mistreatment or inhuman living conditions, but rather were allegations of a discriminatory test such as the ladder test. How can someone who owns an orchard not know whether a potential employee can climb a ladder to pick fruit or not. One hundred 55 claims and 15 lawsuits later, this grower is now out of business.

As a result, the effects were financially devastating. The once prosperous Fruit Growers Association in my State has gone out of business. Maryland was once able to produce 2.5 million bushels of apples a decade ago. We are now down to 1 million. I can give you the documented file of the case. It is rather thick. I think we can scrub it so it might come down just to that thick, approximately 3 inches, Congressmen, I hope you will enjoy reading it because it is fascinating to watch this scenario as it has developed over several years.

You are familiar with two bills that I have introduced in reforming Legal Services. They are deliberately narrow in scope, with hope of modifying without gutting the intent of the Legal Services Program. Further, the Combest bill, which also provides guidelines for clarifying the boundaries for which the Legal Services Corporations, would be operating most effectively.

It has been a long time, over 10 years, since we have reauthorized Legal Services. In the case of western Maryland, the damage has already been done. I am optimistic, though, that some changes can be made to allow Legal Services to serve those who it was and

is intended to serve. And, with the testimony here today and in the coming weeks, I hope the subcommittee can arrive, really, at a reauthorization that addresses my concern and at the same time protecting the integrity of the Legal Services Program.

My colleague from Maryland, a former member of this subcommittee, is going to testify in a few moments. I am sure he has a slightly different view than I do, but I will be glad to submit to the committee for their perusing my case file of one individual case, and I think it gives you a good opportunity. It will take me a little while to pull that together, but I will see that you get that.

Mr. FRANK. Don't worry about scrubbing it. It just occurred to me, and I have mentioned this to the two staff members, I think we will maintain at the subcommittee office a kind of a library of these things so all of the members can go and look at it and the staff can help us.

Ms. BYRON. OK. I mean, if we don't pull some things, it is yeah thick. We will make it down to about that thick.

Mr. FRANK. Make it no taller than your junior Senator.

Ms. BYRON. Got it.

[Laughter.]

Ms. BYRON. Thank you.

Mr. FRANK. You are welcome. We appreciate it, and we will be able to talk informally, Ms. Byron.

Ms. BYRON. I will see you on the floor.

[The prepared statement of Ms. Byron follows:]

HONORABLE BEVERLY BYRON

TESTIMONY BEFORE THE JUDICIARY SUBCOMMITTEE ON

ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

Room 2226 Rayburn House Office Building

May 9, 1990

Thank you for the opportunity to testify before the Subcommittee on the reauthorization of the Legal Services Corporation. As you know, this is my second time before the Subcommittee. Let me make it clear, I do not object to a publicly funded Legal Services Corporation. Legal counsel should not be contingent on who can pay for it. However, I have had concern in the past with what seems to be over zealous actions by legal services to prosecute individuals not capable-- financially-- of defending themselves over and over again. Specifically, I am speaking to the actions that were taken against fruit growers in Western Maryland. As I have testified in the past, these were not charges of mistreatment or inhuman living conditions, but rather were allegations of discriminatory tests, such as the ladder test. How can someone who owns an orchard not know whether a potential employee can climb a ladder to pick the fruit? 155 claims and 15 lawsuits were filed against the growers. The effects were financially devastating. The once prosperous fruit growers association has gone out of business. Maryland, once able to produce 2.5 million bushels of apples a decade ago, are now down to about 1 million.

eral Government is not part of that partnership. It has given up its predominant role, and I would hope that as you look at the reauthorization act, you try to find a way that the Federal Government can in fact become a real partner in meeting the needs of poor people.

In 1981, we reached the watershed year of the Federal Government's participation with a $321 million appropriation. That represented two lawyers per 10,000 persons, which is considered the minimum access level. If we are to have the Federal Government meet its goal of minimum access, where it was in 1981, the authorization and appropriation should be $477 million. I commend that figure to this subcommittee.

But now let's talk about what you have most focused on today, and that is restrictions. Quite frankly, Mr. Chairman, I don't think restrictions make sense. It does not to help poor people to place restrictions on how they can get access to our judicial system. I think we should remove the current restrictions that are in law and certainly not expand the list of restrictions on how Federal funds can be used.

Let me comment on a few remarks that my colleagues made earlier on the earmarking of funds. Mr. Chairman, that takes discretion right away from a board. It may be true that one community has certain needs that may not hold true in another community. I can tell you that many States have moved aggressively on child support enforcement, and there are plenty of funds available to help people in child support enforcement, but try to get a divorce. You can't get a lawyer to help you get a divorce. Now, if I understand the earmarking provisions, we are going to get more money for child support and not be able to use those funds to help people untangle their domestic problems. Let local boards decide local priorities. That is the concept of the system. It is working well with the limited funds that are available. Don't make it more difficult for legal service agencies to perform their job.

We are talking about private funds. You want to put more restrictions on the use of private funds. It just makes it more difficult for us to get funding sources to provide legal service needs. There is no way the Federal Government is going to be able to provide all the needs. We know that. We are relying on other sources of funding. To the extent that you put restrictions on the use of private funds, you just make it more difficult for us.

I thought I heard Mr. McCollum mention restrictions on Federal funds during the colloquy between him and Mr. Washington on the redistricting question. But if I understand his proposals, he wants to restrict private funds the same way. So here we have competent lawyers that are able to help poor people and can get independent funding sources, and we are denying them the right to go out and help poor people? I don't think that is a partnership by the Federal Government, and I see no reason why we should be imposing restrictions on the use of private funds.

I want to comment on some of these new initiatives—I am not going to get into a lengthy debate. Let me just use one standard. We talked about class action restrictions. We talked about mandatory arbitration cases. All of us are attorneys. How would you like to be put up against another lawyer knowing that you can't use the

same tools, the same strategy that that lawyer can use? He can use a class action, you can't. He can go to court, you can't. That is not equal access to our judicial system. That is not giving poor people the same access that everyone else has.

I urge you not to consider these additional restrictions. Quite frankly, Mr. Chairman, there is one restriction that if prior practice becomes a reality again maybe you should consider putting into law, and that is to make sure that the Legal Services Corporation Board does not thwart the will of Congress and impose by regulation what they couldn't get by statute. I hope that is not going to be the case with this new board, but I know it was a real problem with the past board.

I know there are going to be compromises. I know we are going to have to reach some accommodations as this bill moves it way through the Congress. But I urge you in reaching your decisions, to listen to the witnesses here today. It is not by accident that it is not just the advocates for the legal service agencies that are here arguing for more money and less restrictions. We have the advocates for the poor that feel the same way. People who are concerned about housing issues and landlord-tenant issues and domestic issues, saying don't put these restrictions in place. We have the bar association telling you these restrictions make no sense. Their sole objective is to make sure that we have equal access to justice. We are the custodians of the legal system and we want to make sure that there is equal access to justice. And they are telling you it makes no sense?

And, although I certainly do not question at all the sincerity of my colleagues in suggesting these restrictions, and I know they are very sincere in their desires, it is interesting to point out that the people who support those restrictions, and many of the same who for years have tried to dismantle and repeal and get rid of legal services and help for poor people.

Last point. I think it would be somewhat ironic that at this stage where the Federal Government has been making it more difficult, rather than easier for poor people to get access to our system, where we have restricted eligibility on Federal programs, where we have cut housing dollars, where we have cut education dollars, cut health dollars, cut legal services dollars in real terms, to on the other side say, "But we're going to impose more restrictions on how you use the Federal funds." That is not what we should be doing. That is not creating a partnership to meet the needs.

Mr. Chairman, I know you have a very difficult decision because many times members are going to react on an emotional rather than a substantive point on this. I urge this subcommittee to provide the leadership that we are going to need to make sure that the reauthorization act in fact is a model to help poor people and not to hurt them.

Mr. FRANK. Thank you, Mr. Cardin.

[The prepared statement of Mr. Cardin follows:]

BENJAMIN L. CARDIN
3d District, Maryland

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SUBCOMMITTEE ON HEALTH
SUBCOMMITTEE ON SOCIAL SECURITY

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STATEMENT OF REPRESENTATIVE BENJAMIN L. CARDIN

HEARING ON THE

REAUTHORIZATION OF THE LEGAL SERVICES CORPORATION

SUBCOMMITTEE ON ADMINISTRATIVE LAW

WEDNESDAY, MAY 9, 1990

Thank you for the opportunity to testify before my former subcommittee. Although I am no longer on the Judiciary Committee, which has jurisdiction over the Legal Services Corporation, I am very interested in maintaining a strong federal role in the provision of legal services to the poor. In that regard, I am pleased that the subcommittee has decided to hold hearings on reauthorization of the Legal Services Corporation.

Mr. Chairman, as you are well aware, federal funding for legal services reached its high point in fiscal year 1981 with an appropriation of $321 million. Legal service providers look at FY '81 as a watershed year, for it was at $321 million that "minimum access" was attained -- providing two attorneys for 10,000 poor people. Since that time, however, appropriations have not kept up with the legal services need of the poor, and the goal of keeping appropriations on an equal footing with minimum access have not seen the light of day throughout the past decade.

A recent atudy conducted in Maryland revesled that less than 20% of the civil legal needs of the poor in Maryland were being met. A similar atudy wes conducted at a national level for the American Bar Association lsst yeer confirming what was found at the state level. According to the ABA study, there were approximately 19 million civil legal problems in 1987 for which there was no legal assistance. At the national level only 20% of the legal needs of the poor are being met. The mandate for which the LSC wss created still exista. There are millions of Americans who are being denied equal accesa to our legal system because they are unsble afford legal assistance.

The LSC's appropriation was increased for this fiscsl yesr and ended up at $316.5 million after sequestration. I was pleaaed to hear that the Board is seeking an increase in funding to $343 million. As we are all too well awsre, these are difficult times for any program seeking a budget increase. We hsve many good progrsms that have weathered the Reagan years and hsve survived in tact, but they are at their minimum subaistance levela. I believe we should attempt to restore funding to the "minimum access" level and to maintain a reasonable level of growth. In today's dollars that would amount to $477 million.

Along with an increase in funding, there are seversl factors thst I believe must be maintained in any reauthorization bill. For a number of years a majority of people on local boards have been attorneys appointed by locsl bar associations. Local program boards determine priorities in allocation of resources, decide broad policy matters including the types of cases the program will handle and assure the financial integrity of the program. There are some who advocate thst local programs should decide what specific caaea could be brought by

program attorneys. This is unnecessary given that local program boards already exerciae full oversight over the program. It would be inappropriate and raises serious ethical iaaues for them to make specific decisions on specific cases.

Likewise, in order to assure local control, the subcommittee may want to look at strengthening the ability of the local priority-setting process to reassure itself and critica that the nuta and bolts legal needs of the community are being aerved. Once this is undertaken, I believe many of these proposals about earmarking funds and timekeeping will be shown to be pointlesa and unnecessary. Sure, there are problems here and there. These are usually discovered and handled adequately at the local level and there is no evidence to suggest that an overhaul of the system is needed. The General Accounting Office is now conducting an investigation of growera' complaints about the legal activity on behalf of migrant workers. According to aubcommittee staff, not one legal services attorney has ever been charged with bringing a frivolous lawsuit. The fact is, the syatem isn't broken and doesn't need fixing.

Some of my colleagues, namely through the Stenholm-McCollum amendments, propose placing limitations on the use of private funds. I believe that these funds are used in manners consistent with the law and that current reatrictions on outside funding should be removed. There certainly should be no new ones. Regulations promulgated by the board last year that attempted to restrict governing bodies, fee-generating cases, and lobbying activity go beyond congressional intent. In my view, it is not the job of the board to restrict the scope of advocacy.

The root of the problem, I suppose, is a fundamental philoeophical difference between the approech of my colleeguee, Repe. Stenholm, McCollum, end Combeet end those of ue who ere satisfied with the current system. While eome of the "reformere" esaert they are not out to destroy the progrem, many of those they ere ellied with have epent the paet decede ettempting to kill it. There ere thoee who would prefer thet legal service sttorneya deal only with child eupport or drug-related ceses. Unfortunetely, some employere and governmental egencies violete the lew and people often need help in what mey be controversiel areee of the lew. I think, for the moet part, thet theee iseues heve been hendled well. The lest thing we need to do, when we should be streamlining the progrem, is to edd to the bureeucracy.

It is essentiel thet we keep our legal services delivery system in tect. It ie remerkeble to me thet the program survived the leet decade. It demonetretes the extent of eupport for the program from Congreee end the localities that ere well served by it. In my own stete of Marylend we have teken the lead in demonetreting whet can be done when there ie e successful public and privete partnership in providing legal services. We heve e mendetory IOLTA program end ere eble to expand the typee of servicea provided to Marylendere. We heve recently creeted a People'e Pro Bono Committee to match privete attorneys who heve volunteered their time with people in need of legal service. We've had the eupport of the Governor, the stete legieleture, and the organized bar during much of our expansion of legal servicee.

Mr. Chairmen, I only wish thie great partnership could teke hold et the nationel level. It is time to put the bitternees behind us. This reauthorization process is e good plece to stert. Thenk you for the opportunity to shere my viewe with the eubcommittee.

Mr. FRANK. I have no questions. I appreciate your willingness to spend as much time as you have on this.

Mr. James.

Mr. JAMES. Yes. Let's say you got $300 million a year roughly. Suppose you spent 100 percent of your moneys on class actions for political purposes of reestablishing or properly establishing lines to keep it from being gerrymandered throughout the Nation. Suppose you spent all of that. Would you think that thwarted the purpose of the act?

Mr. CARDIN. I don't think you are giving a realistic example.

Mr. JAMES. Could you answer my question? Do you think that would thwart the purpose of the act?

Mr. CARDIN. I think that any Legal Service Board that devoted all of its resources to restricting cases, if we are talking about a general Legal Aid Bureau, I think we should get rid of that Legal Aid Bureau.

Mr. JAMES. OK. Suppose they did half?

Mr. CARDIN. Get rid of the board. The objection should be voiced at the local level.

Mr. JAMES. Then you agree there should be an audit as to the type of the cases so that you would know whether to get rid of the board or not?

Mr. CARDIN. I am not sure I understand.

Mr. JAMES. Then you must agree that you need an audit procedure in order to make a determination whether there is an abuse as far as the time allocated and the money allocated toward a board.

Mr. CARDIN. I could speak to how we do it in Maryland.

Mr. JAMES. I am asking you a question. Would you agree that it is proper to have an audit procedure then to make that type of determination as to the type of case involved?

Mr. CARDIN. It is my understanding that local boards do that now. I can tell you the Maryland Legal Services Corporation audits every one of our grantees and we look at every type of case that they handle and make our judgment on how to allocate the resources that we have based upon the needs and priorities. That is being done today.

Mr. JAMES. Then maybe in your State it is. Would it be appropriate to make that a requirement by statute?

Mr. CARDIN. Again, I am not exactly sure what you would like me to agree to. I am not going to agree with something until I see it in writing.

Mr. JAMES. Please, Congressman Cardin, I am not asking you to agree with anything. I am asking a straightforward question. Do you think that it is the proper subject matter of the statute or the act or the bill to require there to be an auditing procedure so that you can make that determination before the dispensation of Federal moneys?

Mr. CARDIN. I have no objection. I think it is appropriate for there to be the proper audit procedures in Federal law to make sure that Federal law is being complied with.

Mr. JAMES. You don't or you do? I missed that.

Mr. CARDIN. I do.

Mr. JAMES. Good.

Mr. CARDIN. I think there should be proper audit procedures to make sure Federal law is being complied with.

Mr. JAMES. Good. Thank you.

Would you think it is fair to have a proper audit procedure as to where the moneys are spent in relationship to type of cases within the individual grantees of the funds?

Mr. CARDIN. I think that information would be extremely useful for the Legal Services Corporation, for the national Legal Services. I think that would be very useful.

Mr. JAMES. OK. Thank you. So you would agree that in both areas we need to consider legislation, some form of mandate to give us some accounting of both the types of cases and where the moneys are spent?

Mr. CARDIN. You are talking about a means of determining what types of cases are being handled through an audit, if I understand correctly.

Mr. JAMES. Yes, audit and moneys. I mean both areas.

Mr. CARDIN. How the moneys are being spent. I think that any time we appropriate Federal funds we should have those type of requirements.

Mr. JAMES. Now, you said earlier in your testimony that you thought that it was appropriate to use private funds commingled with I think is the legal term, with Federal funds in order to accomplish some purpose.

Mr. CARDIN. That is not what I said. I said I don't think we should impose restrictions on how legal service agencies that accept Federal funds can use their private funds.

Mr. JAMES. OK.

Mr. CARDIN. Now they have to have adequate recordkeeping to assure us that if there are—I don't favor restrictions on the Federal funds, but if there are restrictions on the Federal funds that they are not using the Federal funds against the Federal purpose, and that they have adequate accounting records to show that their private funds are segregated and the funding sources segregated from the Federal funds.

I might tell you, Mr. James, that we have restrictions imposed by our State legislature on how we can allocate State funds. So the same problem exists for the grantees in Maryland from their Federal fund sources and their State fund sources, and there has been no difficulty at all as far as we are concerned in auditing to make sure that the State money is being used for the State purposes. We require those type procedures, and those procedures should be required at the national level.

I don't think that affects the ability of a legal service agency to get private funds and use the private funds solely for other purposes.

Mr. JAMES. Then would you suggest we establish a formula for when you have let's say $100,000 of outside, private funds contributed to a program that otherwise has $100,000. Wouldn't you need a formula at least to prorate the expenses of the facility, the attorneys' fees, the typewriters, the paper costs, the secretarial costs, et cetera, to make sure that the proper hours were allocated on what was federally approved as opposed to what it was otherwise used for? Would you think that would be necessary and essential in

order to commingle the use of the same facility, attorneys, et cetera?

Mr. CARDIN. There are already established accounting guidelines for tracing funding sources within these agencies. It is not that difficult. You don't have to trace every pencil that is being used. There are established ways, accounting principles for determining allocation of funds.

Mr. JAMES. And we need to have an auditing procedure to make sure that occurs.

Mr. CARDIN. I said I favor in Federal law an auditing procedure to make sure that the funds are used as required by Federal statute. If a Federal statute has restrictions on the use of those funds I personally don't support, I would still favor an auditing procedure being incorporated into the Federal authorization act to make sure that the local grantees use the money as required by Federal law.

Mr. JAMES. OK. Because we heard a lot of testimony to the contrary. I don't know which is true and which isn't. Many of the witnesses testified there is no procedure. Other witnesses said, oh, there is plenty of procedure. I am just totally confused by it and so that is why I asked that.

I would want to thank you for your testimony. You have been a big help. And thank you very much for the candor and straightforwardness of your answers. I really do appreciate it. Thank you.

Mr. CARDIN. Thank you.

Mr. FRANK. I thank the gentleman. I think this has advanced the consensus process.

Let me make one point that I think may explain some of the confusion. We have had a board for many years which, as people know, was composed mostly of people who didn't think there should be a program, and that complicated the enforcement effort, and I think that is a part of it. Now there is a board with which there will be some disagreements but which certainly appears to us to be very much in support of the basic program. I think that makes it easier to do enforcement procedures. Because when you have got people in power at the board who are known to be opposed to the whole program, every enforcement procedure tends to trigger a battle. It is the point that Mr. Washington began his questioning with. When people have a suspicion or in some cases the fact that the people who are doing this are just flat out opposed, they are going to be less conciliatory.

Ideological opposition to the program and enforcement of the rules have been totally intermingled for the past few years. We honestly believe now that we have got a board where that won't be the problem, and that is going to make it easier for us to get the appropriate——

Mr. CARDIN. Mr. Chairman, let's wait until the board gets confirmed. We have a confirmation process that still must be gone through.

Mr. FRANK. Well, I never wait for the Senate.

Mr. CARDIN. Well, I would still like to know certain views before we get——

Mr. FRANK. I appreciate that. And I said it appears to be. I am encouraged by these appointments and we will see. But I agree we haven't. And remember, the bill has to pass the House and the

Senate, and the attitudes of the Senators who are involved in drafting this legislation will be very much affected by what goes on in the confirmation process.

Mr. Staggers.

Mr. STAGGERS. Thank you, Mr. Chairman.

Ben, I thought that you may have made the point that the chairman was trying to address. That for some of those, you know, looking at those who support restrictions and are questioning our motives, that they never have supported Legal Service in the past. Actually, it would be good for me if you would come out to my district and make those statements because I have supported them, my record reflects that, and they don't want me to, to some extent.

I don't think you can put us all in the same container. I think there are some people such as myself who are very supportive of Legal Service and that, in fact, I think we need to do more.

But there are some restrictions, and there is one statement you make—I am trying to get the page—the second page of your prepared statement at the bottom, the last sentence, that there are some who advocate that local programs should decide what specific cases could be brought by program attorneys, and then you go on to say that this is unnecessary given the local board, the program boards already exercise full oversight over the program.

My question would be would you object if it was limited? For instance, class actions do involve a lot of resources. That maybe the local board would have to sign off on those. And specifically, what I am thinking of is what your colleague from Maryland indicated, the cases, the problems that she was citing. If I am familiar with the case that she has run into it has been over administrative rules or regulations and so the farmer is the one who is brought in also. The farmer has to bear the cost where really the beef is not so much with the farmer, but it is with DOL or USDA or whatever, their interpretations of their rules.

It would seem to me that, you know, as a practicing attorney the first thing you are going to do is to bring everybody in, at least I would, and maybe if you had a group of attorneys sitting down and saying, well, maybe it might be best to, instead of, you know, bringing the farmer in, because really our problem here is with the rule or the regulation promulgated by DOL [Department of Labor] is that something that you could live with?

Mr. CARDIN. Well, first let me say, and I want to make it clear for the record that I certainly am not questioning the sincerity of people who are suggesting that certain additional restrictions be imposed or certain existing restrictions remain in law. I think particularly in your case, I know specifically of your interest in legal services and your record, but I think in this particular case when you take a look at the McCollum-Stenholm bill and their efforts that have been supported by a lot of the opponents of legal services. Certain of their provisions would do terrible harm to legal service programs, and I must speak out about that.

Mr. FRANK. Yes. But, in their absence, let's not characterize.

Mr. CARDIN. Well, I am just——

Mr. FRANK. I understand that, but let's not because we are going to reopen a debate.

Mr. CARDIN. Well, the recommended changes—again, I don't question their motives and there are serious problems that need to be addressed. But on the other hand, just because there is a serious problem if we pass an act that is going to hurt poor people, I think we have got to speak out about it.

Now, with regard to board authority, if you are going to serve on a board, if you want to be able to carry out the responsibility of being a board member, and if we impose so many restrictions that don't allow you to do that, you are not going to serve on the board.

Mr. STAGGERS. I agree with that. Too many restrictions, and you are right. I don't want to have the board sign off on everything either. But I can see that there may be some cases which we may want to look at. And I don't know all the cases either. That is why we are having this hearing. In theory, are you opposed to any restrictions or can you envision that there may be some restrictions that we might want the poor to sign off on?

Mr. CARDIN. Philosophically, I oppose restrictions. However, I want to see an authorization bill pass. You are not going to pass an authorization bill without restrictions. You will need to develop surgically restrictions that cover some of the legitimate problems that have developed in providing legal services.

So I want to see an authorization bill passed. You are not going to be able to pass an authorization bill without making some compromises in this area, and I welcome the chairman's invitation, and also Mr. McCollum and Mr. Stenholm's invitation, to sit down and try to resolve some of these differences. I think that makes sense. But, as we do it let's be mindful of the overall objective to provide greater access to poor people.

Mr. STAGGERS. Let me see if I can nail you down one more time.

Mr. CARDIN. OK.

Mr. STAGGERS. With those two specifics, and you don't have to answer the question. I can realize that maybe you haven't examined them. But those two, with the class action or with an administrative rule or regulation, is that something that——

Mr. CARDIN. I think they would be compromised. We compromise class actions in Maryland, and there are ways that you can—there are certain notice requirements that you can require ahead of time, certain things that do not really thwart an attorney's ability to properly represent his client. I think there are ways of compromising those issues.

Mr. STAGGERS. Thank you, Mr. Chairman.

Mr. FRANK. Mr. Washington.

Mr. WASHINGTON. I have no questions, Mr. Chairman, thank you.

Mr. FRANK. Thank you, Mr. Cardin. We will expect you to play a major roll in this and you will be welcomed back for the markup. Your experience, I should add, not just with legal services but as a former speaker of a State legislature—we count on that. Thank you very much.

Mr. CARDIN. Thank you, Mr. Chairman.

Mr. FRANK. Next, we are going to hear from Mr. John Curtin, who is president-elect of the American Bar Association.

Mr. Staggers is leaving to markup the farm bill. Despite his references to his political situation, he was here yesterday, which was West Virginia's primary day, so I don't think he is too worried.

STATEMENT OF JOHN J. CURTIN, JR., PRESIDENT-ELECT, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. CURTIN. Well, thank you, Mr. Chairman. I am, as you say, John Curtin, the president-elect of the American Bar Association. I am very pleased to appear here at the request of the president of the American Bar Association and on behalf of the American Bar Association to speak with respect to this reauthorization bill.

I have written remarks and I don't want to read them at you——

Mr. FRANK. Without objection, we will put them in the record.

Mr. CURTIN. And I will speak from an outline and try to cover some of the points that have been raised here by prior speakers.

First of all, let me thank the committee for supporting legal services over the years, and thank the committee for undertaking this process of reauthorization. As you heard from Congressman McCollum, the ABA is meeting with him. I am going to be the one from the ABA who will be meeting with him at 2 o'clock, and I was pleased to see that he expressed some flexibility in some of these proposals, and I hope that we will have a chance to discuss those issues on which we, perhaps, can find some common ground.

But having said that, I have to say that the American Bar Association has some problems with the McCollum-Stenholm amendments, and I can group them, for purposes of ease, into three separate categories.

First of all, there are some of the provisions proposed which focus on control by a rather distant bureaucracy in Washington, rather than on local control, and the whole concept of this Corporation from its very beginning was not to have a national corporation in Washington controlling local programs, but to let local boards deal with local problems in local ways. So I am concerned at anything which undercuts that.

My second concern was well stated, I thought, by Congressman Cardin. There, obviously, in any federally funded program needs to be administrative regulations and oversight. The question is how much red tape will be imposed in order to achieve those laudable goals? Will those redtape provisions help the poor or will it put obstacles in their way? And my concern is that some of the provisions, which I will discuss, will in fact not help the poor but will put obstacles in their way without any corresponding benefit.

Finally, there is the problem that there may be an unintended effect on the voluntarism which has, in my view, been a very substantial part of the process of providing legal services to the poor and which has dramatically increased over the last decade.

So let me focus a little bit on the first point, the fact that there appears to be a shifting of control from local boards to a distant bureaucracy. The earmarking provision is one that troubles me in that connection. It ignores the diversity of local needs. To put it as bluntly as possible, the needs of the South Bronx are not the needs of a rural farm area, and to suggest that by fixing a particular dollar amount and saying that two particular projects, which may be very laudable—obviously, the American Bar Association strongly supports an effort to remove the drug scourge from our country and we also support the need for providing for attorneys to secure child support for people who are lacking in funds.

But the problem is that it is an allocation that does not take into consideration the needs of the local jurisdiction. I know Congressman James mentioned that he was concerned about whether there had been any increase in the efforts in child support. The statistics that I have been furnished indicate that from 1982 to 1989 there was an approximately 27-percent increase in the funds used in order to deal with child support in the Legal Services Program.

More than that, of course, the Federal Government already provides $800 million in this area for enforcement of child support programs. The States provide at least another $365 million, and that is a major provision of funding in this area. The question is what is the most significant need of the community. It happened that yesterday I was at a meeting of the Greater Boston Legal Services Corporation, their annual meeting, and I took their brochure and was thumbing through it on the airplane down here, and there is, as one of the highlights of their program, a section which talks about their providing advice to an unmarried woman with two children, 5-year-old Shashana and 3-year-old Carlos. The woman had been living with a man for 11 years. The man walked out. By virtue of the guidance of the caseworker at the Greater Boston Legal Services, she was advised how to file a paternity action, the paternity action was filed and now the successful action has resulted in medical insurance through the father's employee and $175 a week for food and shelter. That is highlighted in this program.

But also highlighted in this brochure are the problems and special efforts that have been made to deal with abusive women abused by their husbands and with the need for housing. My only point is that those judgments as to how much money should be spent in a particular area are particularly judgments that should be made by those who have knowledge of the conditions of that area, and therefore should not be imposed by some national group on a national basis throughout the United States. It may vary.

With respect to the prohibition on redistricting, I have a concern about that. I can understand that the label of getting involved in politics is a forceful label and one that sometimes carries all before it. But I am concerned that there is a misunderstanding here. We are not talking about, in the real world, congressional redistricting. We are talking about the local level where minorities are frequently denied a voice on commissions in States, where we have violations of the Voting Rights Act, where we have constitutional violations, those kinds of violations may be so important to the local area that they are willing to spend some funds on it. But there is very little activity in this area. But, if it is important, it is the local people that should make that judgment, not some national group based on some general standard.

Similarly, and I will talk about this a littler bit more later, restrictions on non-LSC funds. This is a key violation of the local control principle and prevents the kind of fine-tuning of a program that is appropriate at the local level, and I would make this point. This is not a question of the Congress' purposes being thwarted somehow by having a group that also receives funding from Congress going out to other providers of funds in the area and obtaining funds from them.

For example, you have got a serious federalism problem if you try to do something like this. In my own State, Congressman Frank, the State of Massachusetts, the Federal Government supplies about $2 million, to the Greater Boston Legal Services Program. We have a State, the Massachussetts Legal Assistance Corporation, that supports $1.5 million. If the Congress decides that the State funds cannot be used, and that is what I understood Congressman McCollum to say, for the purposes which that State legislature has authorized the funds, well, we are in a heck of a fix.

And similarly, there are foundations, there are bar leaders, there are all sorts of groups that provide funds for a particular purpose, and those we should be encouraging in this era of scarce resources, the solicitation of these funds to help the poor get legal services, not discouraging it by limiting what such moneys can be used for.

Let me talk a little bit about the redtape issue. Obviously, there has to be some form of keeping records in certain areas. As to the particular one that Congressman Cardin talked about, records have to be, obviously, kept if you are going to have funds coming from separate sources. Records obviously have to be kept if you are going to try to go into a courtroom and try to get reimbursement for legal fees. But there has been a history in this area of a kind of fund accounting which is not known and not required by other governmental entities, and that kind of functional accounting, as it was termed, was sent to the General Accounting Office for an opinion as to whether or not this made any sense in the context of legal services. And you have to remember these are not law firms in which the timekeeping function serves as the basis of bills upon which they get paid, except in the instances where they go to court for it.

The General Accounting Office report was there hasn't really been a study of what information they need for management purposes, what is cost effective. In a law firm or any other place you can get an awful lot of information, and some of it isn't going to be used and some of it is counterproductive because it takes time away from the productive function, in this case providing legal services to poor people. So before any kind of recordkeeping is adopted, there should be an analysis, which hasn't been done here General Accounting asked for it and it was never done by the Legal Services Corporation—an analysis of what makes sense, what information do you need, and how much does it cost to get it. So you can do a basic cost-benefit analysis.

On the fraud and abuse question, well, obviously, as Congressman Frank says, we are all against any abuse in these programs. But I will say this. There is a history here of this expenditure of 3 billion dollars' worth of Federal funds over the life of this program, and when President Wear of the Legal Services Corporation was asked to give documentation with respect to how many cases of fraud and abuse there were he sent over 20 cases. And in all or most of those, those cases were cases which were detected by the local program at the local level and action was taken by them.

Now, if there is a prosecutorial problem, if the laws are inadequate, then, obviously, there should be adequate laws. But there can be a real drafting problem here. And more than that, in the language at least that I have seen in the bill there is a private

right of action that is being given here which goes far beyond mere criminal prosecution. And, if that is the sort of thing that we are talking about as a supplement, then I am very concerned about that. That can be used as a tool for harassment. And I will tell you the last thing the Federal courts of this country need are more private rights of action. We have got an awful lot of litigation going on here.

So, if there is a problem of prosecution, meet that problem, draft the appropriate legislation or incorporate it, but don't pass statutes or additional laws unless there is a need for them.

With respect to the farmworkers, now, as Congressman Frank knows, Massachusetts is not the farming community that it once was. In my experience on legal services boards where I served both in the old days of the Legal Aid Society and then Greater Boston Legal Services and our State Legal Assistance Corporation Board, I have had very limited experience on that, but there are people who know a lot about the situation.

I would make some general points. First of all, this is clearly a class that the Congress of the United States has determined to be vulnerable. These are people who need help. They do not need to be hindered, and it is therefore dangerous, it seems to me, to single out this group for more hurdles. Obviously, alternate dispute resolution can be an appropriate tool. The American Bar Association is on record all over the place supporting that as a vehicle. It can also be used as a tool for considerable delay in vindicating rights. You could possibly explore issues like mandatory arbitration. That might be a way of moving things along.

But as I understand it, we are talking about imposing burdens only on the farmworkers, not on anybody else in the process. There has been, in my view, no compelling need shown and there needs to be a need shown why, apart from the available resources in the various court systems throughout this country which more and more have options of alternative dispute, there should be mandated some form of alternative dispute resolution for one participant in the process. Lawyers negotiate all the time. There has been some suggestion that some of these suits may be nuisance suits, filed in the hopes of some money settlement where there is no merit to the cases. Well, in those cases which have gone to trial there is a clear indication by the number of wins that these cases are not in general nuisance suits. In the illustration that Congressman Stenholm gave, obviously it is hard to deal with an illustration when you don't know the names of the parties. But $70,000 to settle a case—I represent a lot of defendants, and $70,000 to settle a case seems like an awful lot of money to be paying for a nuisance settlement. I would guess that you probably would have had some depositions in that case and the facts in that case would have been ascertained before any lawyer recommended to his clients to pay $70,000.

So the fact that it may cost money, that some defendants pay money and that it may take time to litigate is not in itself a reason why you should put obstacles against the other party.

The antisolicitation is a serious issue, and we have ethical rules. The American Bar Association has ethical rules and there are remedies to stop solicitation. But my suggestion to you is you have to deal with the people as you find them. You are dealing with, as I

understand it, farmworkers who have a language barrier, and who are isolated. They don't have cars they can jump into and go down to the legal services office in the local community. They have trouble communicating and therefore, as I understand it, courts who have been asked to consider whether or not actions taken in this area were providing access to legal services or soliciting have generally determined that it was access, not solicitation.

But, if it is solicitation there are other remedies that can be used. But I would urge that without very careful thought you not put obstacles in the way of people who have trouble with the language, making it difficult for them to understand what is going on, and who are isolated from having access to lawyers.

With regard to specific cases, there is language in the McCollum-Stenholm amendment which I have trouble with, and I have trouble with it also in the light of what Congressman McCollum said today. I am going to talk to him about it. But there is clearly a difference between boards setting overall general policy and having control over specific cases that come to the agency, and, in fact, the American Bar Association has issued ethics opinions that deal with this issue, and it requires that there not be interference by local boards with the specific case because it so interferes with the independence of the lawyer and his relationship with his client.

And, for example, just to take Texas as one illustration of that. In the appropriate rule, which is rule 5.04, the "Professional independence of a lawyer," the example given involves a situation where various types of Legal Aid offices are administered by boards of directors composed of lawyers and nonlawyers. In these cases a lawyer should not continue employment with such an organization unless the board sets only broad policies and does not interfere in the relationship of the lawyer and the individual client that the lawyer serves.

So I would hope that Congress would not provide statutory language which would implicate ethical rules that are adopted, not by the American Bar Association but by States. The ABA recommends them but the States adopt them. There is no showing that such a change is necessary.

The final point I make is my concern about the chilling of voluntarism. IOLTA raised $60 million last year. IOLTA is an acronym for Interest On Lawyer Trust Accounts. Those are funds that have been generated either on a mandatory basis or on a voluntary basis throughout the States. The funds are a result of interest banks are able to generate by lumping small funds that would not otherwise generate interest but are held in the bank for a short period of time. Now those funds are meant to supplement, not to duplicate program services.

There is clearly, in all of those States generally accepted accounting principles recordkeeping provisions in place that permit you to trace IOLTA funds and how legal services grantees spend them. In the State of Massachusetts, for example, which uses IOLTA but also has a fund filing, the State of Massachusetts provided the Greater Boston Legal Services—and there is a similar parallel involving other States and other legal services programs—$1.5 million of funds. The Federal Government provided approximately $2 million. Obviously, the States have an interest in being sure that

there is not fraud and abuse in those programs, and there are monitoring programs that are conducted by the State as well as by the Federal Government.

So I would urge you not to use the leverage of the Federal funding, which in this case—the case that I have been most familiar with, Greater Boston Legal Services—is only $2 million out of a total funding of $6 million—approximately $2 million should not dictate how $2 million from volunteer givers and from the State can be spent.

On the competitive bidding issue, which has been alluded to by Congressman McCollum, I caution you. I have been involved for a long time in pro bono programs. The American Bar Association has set up pro bono programs all over this country. There are now 130,000-plus lawyers involved in pro bono programs.

But the beauty of those programs is they do not handle the intake, they do not handle the preliminary evaluation. Lawyers take a case that has been given to them and work on it. And, if you create a situation where you injure the staff programs, then the volunteer programs are going to be hurt and hurt badly.

Furthermore, if there is competitive bidding and you have some funding of these programs, you are paying money to a lawyer down the street for them, the obvious question is why the lawyers should do it for nothing if a lawyer across the street is getting paid for it.

There is a further danger that cost, not quality is going to be the key, and that has been demonstrated in all of the studies that have been done in indigent defense funding throughout this country. There is a clear history of it not working in this area. But in my written remarks, there was an effort made in Columbus, OH, where they tried a competitive bidding model on the civil side and they ran into an incredible amount of problems, including low-balling the original bids, then trying to up the payments, attempts to skim the more lucrative kinds of cases, an inability to be flexible when the law changed and required different services, all of those. They are detailed in the written remarks.

The basic point is the system is underfunded. Even though it is underfunded and we only meet 20 percent of the needs of the poor, it is working at least reasonably well. You should not attach restrictions that would change that system substantially without a showing of substantial need for those changes. So I have that general thought.

The burden seems to me to be on those who propose these restrictions to demonstrate that there is a cost-benefit analysis that works here. And, if it ain't broke you shouldn't try to fix it.

Mr. FRANK. Thank you, Mr. Curtin.

[The prepared statement of Mr. Curtin follows:]

Prepared Statement of John J. Curtin, Jr., President-Elect, on Behalf of the American Bar Association

Mr. Chair and Members of the Subcommittee:

Let me begin by thanking you on behalf of the American Bar Association for the opportunity to testify before you today. I am John J. Curtin, Jr., President-Elect of the Association. I am here today at the request of President L. Stanley Chauvin, Jr. to express the ABA's support for a vigorous and robust legal services program free from unnecessary restrictions.

I have long been interested in legal services, having formerly served as a Director of the Massachusetts Legal Assistance Corporation, a state-funded version of the Corporation, and as a Vice President and a Director of Greater Boston Legal Services. I have also served as the chair of the ABA's Standing Committee on Legal Aid and Indigent Defendants. These positions have permitted me to gain some knowledge about the workings of legal services in this country, both on the street level and on the national level. My remarks this morning embody that perspective.

Let me begin by expressing the American Bar Association's appreciation to the Chair and to the Subcommittee as a whole for their steadfast support of the legal services program over the years. You have been instrumental in insuring that the program continues to guarantee high quality legal representation to those among us most in need.

Like virtually all bar leaders in the United States today, I am seriously concerned about the so-called McCollum-Stenholm proposals, both in practice and in principle. While the proposals address a wide variety of seemingly unrelated issues, they appear animated by three underlying premises:

1) a preference for micro-management by distant bureaucrats over the leadership of local community leaders;

2) a preference for much red tape and many restrictions over reliance on proven systems of control, common sense and confidence in local leaders; and

3) a disregard for a significant and serious side effect of the proposals, i.e., the propensity to discourage volunteerism.

Let me turn to the first category of proposals, those that would centralize power in a distant bureaucracy. These proposals generally operate to prevent local boards from fine-tuning their programs to meet the needs of their communities. They come in two varieties.

First are those amendments which would require local programs to spend a certain amount of money on certain kinds of cases, regardless of whether the community has any need for that type of legal services or whether the need for other services is more critical. Specifically, LSC funds would be earmarked to fight drugs and to enforce child support awards.

Those goals are laudable in the abstract but the practical problem with such legislation is that it ignores the diversity of local needs and thwarts the necessary fine-tuning of the caseload mix that only local boards can supply. The simple fact is that the needs of a community like the South Bronx are not likely to be the same as those of a community in rural Texas.

Despite the facial appeal of earmarking for a desirable purpose, earmarking legal services funds to be used to fight drugs is unwise. Even assuming that legal services attorneys have some sort of expertise that would be helpful in this task; that it would be appropriate to use them in what is essentially a criminal justice issue; and that they should be used to "bring[] . . . proceedings" against individuals who "affiliate" with "persons who allegedly use or distribute drugs illegally" whatever that language in the McCollum-Stenholm amendments may mean; such work does not rate the same priority in every community across our very diverse nation. National earmarking is simply inefficient. Programs will be forced to spend the finite dollars available to them on representation that may not be the most critical to their communities. Those dollars will be diverted from cases that the local boards have classified as having high priority.

For the same reasons, money should not be earmarked for child support work. In addition, child support cases handled by legal services offices increased 27% between 1982 and 1989, so more and more of this kind of work is already being done by the various programs. Moreover, the federal government spends over $800 million a year and the states another $365 million a year for child support

enforcement. Given the very scarce resources available for legal services and the substantial money already devoted to child support enforcement, earmarking of still more dollars for such enforcement is inappropriate. If particular communities require that a higher percentage of their legal services funding be devoted to this kind of work, local boards are charged with the responsibility of identifying that need and shifting monies accordingly.

The McCollum-Stenholm amendments would work to impose a cookie-cutter caseload mix on the hundreds of very diverse local programs in a second way. In addition to imposing upon local programs priorities that may not be appropriate to their unique circumstances, the McCollum-Stenholm amendments would also restrict local programs from pursuing cases that should be priorities, regardless of whether such activity was funded by Corporation or non-Corporation funds. For example, the amendments prohibit local grantees from redistricting activity. The effect, quite simply, would be to deny to one class of citizens, the poor, the rights the Constitution has given to all citizens to participate on an equal basis in the election of public officials as well as the rights Congress has accorded to all citizens under the Voting Rights Act.

Although very few programs have ever done redistricting work, such matters are nevertheless often vital. Such cases are not brought to benefit a particular political party. Rather, they are frequently based on the effective denial of the right to vote because of discrimination based on race -- cases involving, for example, county commissions with at-large districts resulting in no

minority members despite a sizable minority population in the community or a state legislature with districts gerrymandered to dilute the voting power of minorities. The Corporation's 1985 report to Congress revealed that the bulk of these activities, many of which do not involve litigation, are focused on the local level. When possible redistricting cases arise, local boards of directors are best situated to determine whether they should be brought, given the community's other competing demands for services.

For the same reason, other restrictions that McCollum-Stenholm would impose on local programs, prohibiting the use of private and IOLTA funds for certain types of cases, should also be rejected. A central principle of the Legal Services Corporation since its inception has been a commitment to local control of programs. The Corporation should continue to respect that principle. We agree that the majority of the members of a local board should be mainstream state and local bar representatives. These lawyers are joined by clients and community leaders. Together, these individuals, who live and work in the city or town or region affected, provide exactly the kind of responsible, informed, concerned leadership that is best situated to tailor a program to a community's unique needs.

The rationale for not earmarking Corporation funds applies equally to restrictions on the use of other funds. Communities have widely differing legal services needs and the people who can best identify the needs of, say, Casper, Wyoming do not live in Washington. They are the people of Casper, Wyoming themselves.

Just as local boards should not have their hands tied by earmarking, so too they should not be limited in how they spend non-Corporation funds.

A second category of the McCollum-Stenholm proposals would impose substantial administrative red-tape on the programs. For example, the amendments would impose burdensome time-keeping requirements on local programs without any demonstrated need. A national timekeeping system would be imposed which apparently could not be adjusted to respond to the needs and characteristics of individual programs.

The Corporation at present requires detailed recordkeeping and reporting of grantees' activities and conducts in-depth monitoring to ensure compliance with the whole range of legal requirements. No other publicly funded provider of legal services nor any federal or state government legal department, Department of Justice, state Attorney General, or city corporation counsel requires a functional accounting system of timekeeping of the type that has been proposed by the Corporation. No justification for imposing a nationally mandated system on local programs has been advanced.

Before overhauling the system, proponents of the amendments must show that proposed changes are both needed and cost-effective. To the contrary, a General Accounting Office report two years ago found the Corporation's proposed system excessive and unjustified, and suggested that a study of appropriate recordkeeping needs be undertaken before any changes are made. No such study has been conducted.

Excessive administrative requirements are by no means benign. Time spent by a program on timekeeping is time unavailable to clients in need. Every dollar spent by the Corporation to implement and monitor additional timekeeping requirements is a dollar diverted from programs in the field. Indeed, at the meeting of the Corporation Board of Directors on March 26, the president of the board of a small Missouri legal services program discussed how the reporting requirements currently in effect and those under consideration divert resources from client services. Instead of imposing new and additional layers of recordkeeping requirements, the Corporation should decide what information is truly necessary and develop less burdensome and more flexible methods of gathering that information.

The amendments also seek to impose on the programs layers of federal and state civil and criminal statutes as well as OMB circulars pertaining to theft and fraud. No one will deny that fraud and waste in government is abhorrent and should be extirpated. However, this proposal appears to be a heavy-handed solution to a non-existent problem.

A May 3, 1989 letter from Corporation President Terrence Wear to you, Mr. Chair, in response to your request for a list of all cases of fraud or abuse documented by the Corporation, cited only twenty examples of alleged criminal conduct on the part of LSC grantees which occurred between 1980 and 1989. The amounts in question appear quite insubstantial when compared to the approximately $3 billion expended by the Corporation over this time

period. Furthermore, it appears to have been the programs themselves, not the LSC, that in most instances uncovered the wrong-doing and sought prosecution and restitution. The LSC, meanwhile, was devoting over $5 million annually to root out any fraud that might exist.

Based on the evidence the LSC itself has put forward, it would appear that sufficient authority already exists to protect LSC grant funds from theft and fraudulent use and that local programs have been vigilant in overseeing those funds. Why impose several more layers of restrictions on local programs or enact provisions that would create a private right of action?

Indeed, the creation of a private right of action could be pernicious. Such actions could be used for harassment purposes by disgruntled adverse parties and others opposed to program activities. The defense of such suits, of course, would divert resources from the needs of clients and impose an additional burden on our already overburdened justice system.

Similarly unwarranted are the substantial red tape restrictions that these amendments would place on the representation of migrant farmworkers. Congress has recognized the vulnerability of these workers in legislation such as the Migrant and Seasonal Agricultural Worker Protection Act (the "Act"), a vulnerability which stems from their transient nature, their dependence on crew leaders, the linkage of their jobs and housing, their lack of access to the legal system and their communications and language difficulties. By any objective measure, this is a class of client for whom we must do more, not less; for whom we must pave a smoother road to justice, not build barricades.

The amendments, unfortunately, inhibit access to justice. They would create a unique, separate, and unequal system of justice for these most vulnerable individuals by imposing procedural hurdles in controversies between migrant workers and agricultural interests that are not imposed on any other group of poor persons seeking to vindicate their statutory and constitutional rights.

Before the access of one class of potential clients to our justice system should be so burdened, compelling evidence of a grave problem with the status quo should be offered. We have not been shown such evidence. For example, although it is alleged that legal services lawyers fail to attempt to resolve matters by negotiation prior to litigation, the facts are to the contrary. The Act requires courts, in determining the amount of damages to be awarded, to "consider whether an attempt was made to resolve the issues in dispute before the resort to litigation." 29 U.S.C. 1854(c)(2). We are not aware of a single case where the damages awarded to a worker under the Act have been reduced because the worker's legal services attorney failed to engage in a good faith attempt to settle the case before litigation.

Likewise, the claim of nuisance suits and improper factual allegations have not been substantiated. In fact, legal services attorneys win virtually all of the cases brought on behalf of migrant farm workers.

Finally, the so-called anti-solicitation proposal is particularly pernicious. The issue here is not solicitation; ample remedies applicable to all attorneys already exist to prevent and punish inappropriate solicitation. The real issue is access to

camps. Workers. It is simply unrealistic to expect that migrant farmworkers who move frequently, who do not have access to phones and transportation, and who are housed in isolated rural areas will, on their own, be able to locate and get to a legal services program to provide information and assistance to them. Not surprisingly, courts have ruled repeatedly that legal services attorneys must be granted access to migrant worker camps. This proposal should, therefore, be rejected because it would establish a barrier to access that may well prove insurmountable.

A different kind of problem is created by the proposal to require local boards to decide what specific cases can be brought by program attorneys. Local boards, of course, currently establish priorities for their programs as to the types of cases they will handle. However, any requirement that attorney board members decide whether a particular case should be accepted would conflict with their ethical responsibilities as set forth in ABA Formal Opinion 334 (August 10, 1974) (issued by the ABA Committee on Ethics and Professional Responsibility) and ABA Standards for Providers of Civil Legal Services to the Poor 7.1-1 and 7.1-2 (the opinion and standards permit governing bodies to establish broad general policies, but prohibit their direct or indirect interference in the handling of specific cases or the representation of specific clients, including taking actions which would restrict the independent professional judgment of staff attorneys). Requiring an attorney to violate an ethical obligation of this type is, of course, inappropriate. It is also gratuitous in this case because no showing has been made that such an amendment is necessary.

A third category of the amendments should be rejected because their effect, no doubt unintended, would be to discourage volunteerism. President Bush has called for a new spirit of volunteerism in this country in order that those with much may give something to those with little. Lawyers, perhaps more than any other profession, have embraced that concept for years, especially in the area of legal services to the poor.

The organized bar is united in its belief that no amount of private initiative can ever replace a fully funded, professionally staffed legal services program. Nevertheless, because of the manifest and pressing need for more resources, the bar over the past decade has organized to supplement that program in a variety of ways, several of which are relevant here.

State and local bars have worked tirelessly to establish Interest on Lawyer Trust Accounts (IOLTA) programs in most of the states. Through these programs, lawyers deposit in special accounts client monies that are either too small in amount or deposited for too short a time period to qualify for interest in a normal account. Collectively, the monies generate interest and that money is then given to local legal services programs for particular purposes. In addition, programs obtain funding from a variety of private sources -- bar associations, law firms, individual attorneys, the United Way, and charitable foundations.

These contributions are provided in large measure because of the need to add to the services that local programs offer, not merely to duplicate those services. Thus, very often, the monies that are donated by these efforts are donated for use on particular

types of matters that, in the judgement of the grantors, are not being met by the local Corporation program. Any restrictions imposed on the local programs by Washington as to how these supplemental funds may be spent could well have a chilling effect on this type of fund-raising. Donors, be they IOLTA programs or private individuals, are less likely to give money when the recipient can not spend it for the purposes intended. The money in question is not insignificant. IOLTA programs alone contribute about $60 million to local programs last year.

The other way in which lawyers have volunteered to supplement legal services is through the explosive growth of pro bono work in this country, that is legal work for the poor performed gratis by private attorneys. The ABA estimates at present that approximately 130,000 lawyers are engaged in this work.

This important contribution to indigent legal aid is threatened by McCollum-Stenholm's competitive bidding proposal. Most pro bono efforts are highly dependent on staffed programs for intake, referrals, training and back-up, without which they could not operate. Further, if these proposals were to result, as apparently they are intended, in paying private law firms to handle cases, what incentive would a law firm down the hall or up the street have to perform similar services for free? Thus, elimination of the current system will lead to a withering of pro bono work and a loss of perhaps thousands of volunteer lawyers who want to serve, but for practical reasons will be unable to do so.

Competitive bidding is undesirable for a number of other reasons as well. First, there is the grave danger that efficiency and cost, rather than quality of service, would become the most important criteria for rating a program.

Second, in the indigent criminal defense context, competitive bidding has generally proven to be problem-ridden and a failure. Studies of these attempts reveal that costs rose, quality deteriorated and virtually every community abandoned the experiment as the basic delivery mechanism.

Third, competitive bidding has not fared much better in the civil context. For example, the immediate past president of the Columbus Bar Association, Denis Murphy, recently wrote to the new LSC Board:

> Our experience with respect to competitive bidding in Columbus, Ohio was unsatisfactory. The Columbus Bar Association and the Legal Aid Society of Columbus approved and worked with the Legal Services Corporation's Private Law Firm Demonstration Project in 1986-87 . . . . We found with respect to the demonstration project utilizing competitive bidding: (1) the successful bidders either low-balled to earn the contract or underestimated their costs; those who correctly estimated their costs in formulating their bid came in with high bids and were not selected; (2) successful contractors wanted only the simplest and "cleanest" cases to avoid losing money, thus the types of legal problems and issues to be handled by the contractors had to be narrowly defined to fit their case selection criteria; (3) these contracts bid on a competitive bid basis did not accommodate the special needs of eligible clients with mental health problems or other special problems; (4) the competitive bid method did not adjust easily to significant changes in the domestic relations laws and procedures which took place during the contract period; (one of our contractors actually withdrew from the project in midstream because her continuation "would be economically unfeasible") . . . . I believe our experience demonstrates that competitive bidding raises false hopes and creates serious gaps in the delivery of civil legal services to the poor.
>
> - 13 -

We have developed a legal services system in this country which, although underfunded, works reasonably well with respect to those it does serve. Poverty law experts in staff programs are this system's core. Private attorneys provide pro bono services in areas more typically served by the private bar, particularly in the domestic relations area. This proven system should not be abandoned for another, especially one which gives every indication that it will not work, in the absence of any compelling need. We would therefore recommend that, at a minimum, Congress proceed very carefully in this area and prohibit a wholesale implementation of a competitive bidding system at least until responsible and carefully controlled experimentation by the Corporation under the direction of a confirmed Board of Directors provides convincing evidence that such a system is workable and desirable.

Supporters of the McCollum-Stenholm amendments have indicated that the legislation is motivated by the need to rein in runaway programs and rampant abuses. We believe that the proponents of the amendments bear the burden of establishing clearly and convincingly that there is a serious pattern of abuse, that such abuse requires each of these particular steps to be taken, and that each amendment would do more good than harm. To date, that burden has not been met with respect to any of the amendments.

There is a sea called the Aral in an arid part of the interior of the Soviet Union. For millenia, the Aral provided a bountiful life for the towns that lined its shores and the fishermen who plyed its waters. A few decades ago, Soviet engineers began diverting

much of the flow of the two rivers that fed the Aral. This was done as part of a massive irrigation project aimed at permitting the growth of cotton in distant regions upstream from the sea. Today, the sea is greatly reduced in size, what water remains is too salty to drink and the prosperous towns that once bordered its shores are now miles away from the water and declining. For the first time in millenia, their citizens know want. Many are afflicted by throat cancer thought to be caused by dust from the drying sea.

Americans have a saying that sums up pithily, if somewhat inelegantly, the Soviets' experience: If it ain't broke, don't fix it. Before substantially interfering with the workings of a highly complex system, be it the ecology of a sea or a human services organization like the Corporation, the proposer should be sure that the results will be clearly beneficial. This is especially so when the entity already produces much good. Any change that is attempted should proceed in small steps, not giant leaps. As you consider the McCollum-Stenholm amendments, I urge you to remember the Aral Sea.

I have spent a great deal of time on these proposals because I am well aware of the attention they are receiving from the LSC Board and this body. In rejecting these amendments, I am by no means suggesting that no changes could or should be made in the authorizing statute. Quite the contrary. For the reasons primarily rehearsed above, we would recommend more modest amendments that would:

1) Sharply increase the authorized funding level. In FY1981, funding for the Legal Services Corporation peaked at $321 million, a figure which ensured minimum access for the indigent which was defined as two attorneys for every 10,000 poor persons. Inflation over the past decade has so eroding purchasing power that minimum access today would require $477 million.

As a first step in that direction, we have urged an appropriation of $401.1 million this year. We would urge an authorization amount of $477 million so that over the next three years we can continue to climb towards this goal.

2) Reinforce local board decision-making. To the extent possible, national prohibitions on the kinds of cases local programs can handle and the kinds of delivery mechanisms that can be utilized should be removed.

3) Strengthen the monitoring provisions to ensure they are used to improve the quality of legal services provided and not as an excuse for a fishing expedition aimed at uncovering abuses which can be used to attack the program. Monitoring can be arms-length without being adversarial. In addition to its compliance function, it can play a constructive role in assisting programs to address such things as the effective utilization of limited resources.

4) Ensure that non-LSC funds can be used for the purposes for which they are intended and not restricted to the purposes for which LSC funds may be used. Local grantors, such as IOLTA programs, should not be prevented from funding additional needed services identified as significant local needs.

5) Promote the continuation of productive pro bono efforts based on cooperative relationships between legal services grantees and bar associations. In addition, in undertaking any experiments or programs regarding competitive bidding, LSC should be required to consider the impact on pro bono activities.

We wish the Subcommittee well in its task of considering a reauthorization bill. The American Bar Association stands ready to assist you in this work and in our common endeavor: to ensure the provision of first-rate legal services to all Americans in need.

Thank you.

Mr. FRANK. I will be looking to you and your colleagues as we get into markup. And I think once again we have narrowed some areas of recent differences, but I think we agree that with regard to audit and waste and fraud that is not an ideological issue, that is a pragmatic issue. We want to do those things right. There will be some other ones about which we can disagree. But I appreciate that.

We are going to be getting some statistics. I have asked the staff to get me statistics on child support. I would expect there to be an increase. The Federal laws have been changed so that the prospect of success is increased and I would hope that would be reflected. In addition, the question of exactly how much redistricting activity is going on. I think it would be useful for us to know that, and we are going to be asking those kinds of things.

Mr. Washington, any questions?

Mr. WASHINGTON. Sort of a rhetorical question, I guess, Mr. President-Elect. It is sort of preaching to the choir. But a large part of the beginning of the opinion in *Baker* v. *Carr*, as I recall, made it clear that it was not a political decision tracing all the way back to the Supreme Court decision in *Marbury* v. *Madison*. I am not willing to let go unchallenged, although the persons who raised that specter and wanted to limit the use of funds for redistricting. And I tried to, as you were here, approach it from a different point of view——

Mr. CURTIN. Yes, I did.

Mr. WASHINGTON [continuing]. On the basic philosophical question and couldn't get them to engage me there. But let's carry forward, at least for further discussion, the question of whether involvement in litigation that has as its purpose the overcoming of malapportionment is political at all. It may result in election of people, but as I understand *Baker* v. *Carr* and *Reynolds* v. *Simms*, the Supreme Court was clear at the very outset to set out, because as you know there is an admonition against them making political decisions.

So how can one argue that a reapportionment case is a "political decision" when the Supreme Court has decided to the contrary?

Mr. CURTIN. Well, political is a label that gets put on something, if you have a position that begins with the premise that you don't someone to engage in "political activity." My view of that is that we are talking about rights and that no local board is going to authorize those kinds of suits and a redistricting concept unless they are convinced that there is a need to vindicate the rights of a substantial minority in that community. We are talking about basic constitutional rights and the Voting Rights Act. Now that, you may say that that is political, yes. Because the Constitution is political, legislation is political. But presumably if Congress provided those rights in the Voting Rights Act they did so in the expectation that they would be vindicated, and the lawyer is necessary to vindicate the rights of the minority, as you have pointed out so well.

Mr. WASHINGTON. Otherwise it is just a hollow promise.

Mr. CURTIN. Exactly. Exactly. And I know that there is an argument that only 20 percent of the needs of the poor are being met and therefore that is being used to say, Well, we are going to determine what the priorities are.

But it seems to me that the way to deal with that is to increase your authorization to a level which provides more legal services to the poor like the $477 million that Congressman Cardin talked about and which we support, rather than, have a national bureaucracy say, we are going to decide how you are going to allocate resources and what is important to your neighborhood.

Mr. FRANK. Let me ask, Mr. Curtin, to follow up on—I am sorry.

Mr. WASHINGTON. Just very briefly, and I will be finished, Mr. Chairman.

Would you hazard a guess as to whether those same persons who lament the fact that only 20 percent of the people are served would join in efforts to raise the amount of appropriation?

Mr. CURTIN. I sure would ask them to do so.

Mr. WASHINGTON. Thank you, sir. Thank you, Mr. Chairman.

Mr. FRANK. Under the division of labor with the local boards, if a local board decided that it did not want redistricting cases, it would have the right to do that under your——

Mr. CURTIN. Yes. Yes.

Mr. FRANK. Once the case is joined, then the attorney in that case has to be given freedom. But the boards, which by the McCollum amendment, as I understand it, are 50 percent, or a majority of the local bar association——

Mr. CURTIN. Fifty-one percent.

Mr. FRANK. In any case, they would have the right to say this is an inappropriate form of activity.

Mr. CURTIN. Yes. The board sets general policy and in a class action——

Mr. FRANK. I just want to make clear that as a general policy it could say no redistricting-type cases.

Mr. CURTIN. Correct. In fact, there is a requirement in class actions, of course, that it can be delegated to the executive director. But those kind of cases can't be done by a staff attorney.

Mr. FRANK. Next, we have been joined by one of our senior members and, of course, if anybody wants to know if redistricting can be done in a purely nonpolitical and neutral fashion, California is always our best example.

[Laughter.]

Mr. FRANK. So, Mr. Edwards, if you have any questions, we would be glad to listen.

Mr. EDWARDS. No, Mr. Chairman. But Phil Burton is looking down on you when you say things like that.

Mr. FRANK. Well, Phil used to look down on me when he was here too.

[Laughter.]

Mr. FRANK. Thank you very much, Mr. Curtin. We appreciate it. This information is going to be shared. I am sorry that more members aren't here, but I think you are going to find that this is the case where the testimony is going to be read and chewed over, and this is by no means a waste of time.

With that, I will call forward Mr. Spangenberg and Mr. Ross on this important issue of the competitive aspect. And again, while only two of us are here now, the staff is here and I think you will find that what you put in the record is going to be read because this is an issue that will be very significant.

Please go ahead, Mr. Spangenberg.

STATEMENT OF ROBERT L. SPANGENBERG, PRESIDENT, THE SPANGENBERG GROUP, WEST NEWTON, MA, ACCOMPANIED BY L. JONATHAN ROSS, PARTNER, WIGGIN & NOURIE, MANCHESTER, NH, AND COFOUNDER, BAR LEADERS FOR THE PRESERVATION OF LEGAL SERVICES FOR THE POOR

Mr. SPANGENBERG. Thank you, Mr. Chairman. Both Mr. Ross and I have statements that we would like to put in the record.

Mr. FRANK. They will be, without objection.

Mr. SPANGENBERG. And I just have a few comments, and Mr. Ross is available for any questions that you might have.

For the record, my name is Robert Spangenberg. I am president of the Spangenberg Group, a private consulting firm in West Newton, MA, and I have for over 30 years been a member——

Mr. FRANK. Mr. Spangenberg, we don't need an expert witness qualification. Let's get to the matter.

Mr. SPANGENBERG. OK. The question of contracting and competition for bids is one that there is a lot of history on in terms of indigent defense—public defenders, right to counsel, sixth amendment—and it is an issue that has been looked at by county government and State government, for the past 10 years, and I think that what has been found in terms of competitive bidding in indigent defense would be of value to this committee on the issue of the possibility of considering it for civil legal services.

There are just three or four points that I would like to make that we have found, and I believe county government in particular has found in an effort to try to put competitive bidding into indigent defense and public defense.

Mr. FRANK. Let me just ask the reason—and I just want to make it clear for the record. You have got comparisons, you have got history about criminal defenses and the reason for that is that we don't have any experience outside of that, is that correct? I mean, it is not that there is relevant civil stuff that anybody knows about that we are not talking about?

Mr. SPANGENBERG. That is right. There is considerable history——

Mr. FRANK. The only model of statistical information of any size that we have about competitive bidding is in this criminal area.

Mr. SPANGENBERG. Exactly.

Mr. FRANK. I just want to make that clear.

Mr. SPANGENBERG. And, in fact, what happened about 10 years ago, county government in particular has a major responsibility for funding indigent defense, as costs went up dramatically it attempted to look at the system and figure it out—try to figure out if there was another way to contain the cost. The idea that many of the counties came up with was the idea of competitive bidding: The competition in the marketplace theory. That if they put it out for bid to the private bar that they would get bids and they would get services that would be, perhaps, less costly and at the same time provide quality service.

We now have 10 years' worth of history around the country looking back at that process, looking back at that question, and I think

we now have some answers that we could provide to you and the Congress.

First of all, the history is that competition in the marketplace insofar as indigent defense systems is concerned simply hasn't worked. What has happened is that over time the quality of bid by the private bar has become worse and worse and worse. The qualified lawyers who came in and competed and won the awards at the start, got out of the system after the first year or the second year because they found out economically they just couldn't make a living. And what happens over time, what the counties have found is that young lawyers directly out of law school and some marginal criminal practitioners ultimately arrive at the contracts and the quality goes down.

On the other hand, even in that kind of a situation the costs go up. Because the private lawyers aren't willing to bid unless over time there is increasing cost. So what we have clearly found and what——

Mr. FRANK. Would you repeat that sentence?

Mr. SPANGENBERG. Yes. What I am saying is that over time the cost for contracting using the private bar have gone up and exceeded that which, or the cost that would have been there for public defense, say a staff public defender program. And the reason for that is private lawyers get in initially, sometimes at a low figure, but they find economically they can't make it. So they, naturally, push the price up over time in order to make a living. They can't make a living unless the cost—the overall cost go up.

And what the county finds is that over some period of time what they have is they have less qualified lawyers asking for more money to be able to make a living than they would with a public defender system. That is very clear.

What we have also found over time is there are fewer and fewer private lawyers willing to bid. In fact, some counties have abandoned the competitive contract bid system because they can't get any more bidders. Not just qualified bidders, but any bidders. That has been a serious problem.

Another major problem has been the effect that competitive bidding and contracting has had on the criminal justice system itself. It has been very disruptive. The idea of changing contractors from year to year, leaving clients without attorneys, trying to force contractors who are no longer engaged to handle those cases is a very serious problem. It has disrupted the criminal justice system itself.

The idea of competitive bidding has built in some States actually a bureaucracy of State or county officials who spend a huge amount of time on an annual or biennial basis going through the bids, putting out the bids, negotiating with the contractors, and in some cases we found that contracts have not been let and lawyers have had to begin practice and do the contract without having a contract.

So in summary, it simply hasn't worked. Unfortunately, the courts have had to step in in some cases, a case in Arizona, a case in California, where the feeling was the quality was below the standard, below the requirements of the effective assistance of counsel. In a number of States the bar association has stepped in and put standards together that are required in order to have con-

tracting at all. The American Bar Association has a strong resolution on contracting and a set of standards that should be applied in order to have a contracting program.

So the bottom line, if you look at the indigent defense side, and I think it is something that is comparable. It is kind of the flip side of civil legal services. If you look at competitive bidding for indigent defense, it simply hasn't worked over the last 10 years and what we now have in those States or counties that have these programs is a comprehensive set of standards and guidelines to assure that quality will be provided. And what that has meant is that the cost has exceeded what they would otherwise have by having a public defender system. And my suggestion is that that is very likely to happen if this committee and if the Congress were to move toward competitive bidding for civil legal services.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Spangenberg follows:]

PREPARED STATEMENT OF ROBERT L. SPANGENBERG, PRESIDENT, THE SPANGENBERG GROUP, WEST NEWTON, MA

Mr. Chairman and Members of the Subcommittee:

I am Robert L. Spangenberg, a member of the Bar in Massachusetts for almost 30 years and currently the President of The Spangenberg Group of West Newton, Massachusetts. The Spangenberg Group is a nationally recognized research consulting firm specializing in the delivery of legal services to low-income persons in civil and criminal cases.

I began my career as a trial lawyer in Boston, later became the Assistant Dean at Boston University Law School and for seven and one-half years was Executive Director of the Boston Legal Assistance Project (now Greater Boston Legal Services). For the past ten years I have been engaged in the private sector conducting research, providing technical assistance and training in the area of the delivery of legal services to the poor. This work was conducted for five years at Abt Associates of Cambridge, Massachusetts and since July of 1985 with The Spangenberg Group.

Over the past ten years, senior members of The Spangenberg Group have become identified as the leading experts in the country on the delivery of indigent defense services. We have become the primary provider of technical assistance and research in this area to federal, state and local government, the courts, bar associations, public defenders and other groups responsible for providing representation to indigent defendants charged with crime. We currently have two contracts with the American Bar Association to provide technical assistance to state and local jurisdictions concerned about the delivery of indigent defense services.

Contracting and Competitive Bidding in Indigent Defense

It is my understanding that consideration is currently being given to adopting a competitive bidding system for the Legal Services Corporation. The issue of contracting and competitive bidding for indigent defense programs is one that I have had substantial experience with over the past ten years and I felt that

the Subcommittee might like information on how this system has worked around the country.

Background

The use of contract programs to deliver indigent defense services is a relatively new phenomenon. Although public defense and assigned counsel systems date back to the turn of the century in some cities, contract defense programs did not come into use until the late 1970's and only began to spread in the latter part of the 1980's.

A contract defense program is one in which a state, county or municipality enters into an agreement with an individual private attorney, a group of private attorneys, or a law firm or firms to provide indigent representation at a certain level for a certain dollar amount over a given period of time.

A contract with a county may specify that the contracting party will provide all representation in one or more county courts; will provide representation in all cases of a specified type--felony, misdemeanor, juvenile, civil commitment, etc.--in one or more county courts; or will provide representation up to a certain number of cases of a specified type in one or more county courts.

In 1976, the National Study Commission on Defense Services published a lengthy report which for the first time identified efforts by some counties to engage in contracting and competitive bidding for indigent defense services. In September 1986, the Bureau of Justice Statistics, U.S. Department of Justice published their National Criminal Defense Systems Study which was conducted by myself and several colleagues while at Abt Associates. This study provided for the first time a state by state description of the types of systems, expenditures and caseload for indigent defense programs. We discovered that in 1982, 60% of all the counties in the country provided indigent defense services through a private attorney assigned counsel program, 34% through a public

defender program and 6% (201 counties) through a contract defense program.

In September 1988, The Spangenberg Group, through a contract with the Bureau of Justice Statistics, completed an update of the earlier study entitled Criminal Defense for the Poor, 1986, which provided an opportunity to compare the nationwide data between 1982 and 1986. We found that over the four year period, the use of public defender programs increased among all counties in the country from 34% to 37%. Counties using the private assigned counsel systems decreased from 60% to 52% and contract counties increased from 6% to 11%. The growth of the contract system increased primarily in small counties (under 50,000 population) as a result of contracts entered into between county officials and individual private attorneys through a non-competitive process.

I have had an unusual opportunity to examine contract defense programs, as well as public defender and assigned counsel programs throughout the country for the past decade. We have during this period of time conducted studies, provided technical assistance or other information to officials responsible for creating, funding or managing indigent defense systems in all 50 states. We have actually visited 42 states for these purposes during this period of time.

As far back as 1982, I prepared a lengthy article entitled Contract Defense Systems Under Attack: Balancing Cost and Quality. In that article I stated that, "The purpose of this article is twofold. First, to describe a sample of programs, thereby providing a better understanding of what constitutes a contract defense system; second, to analyze a series of issues that must be addressed when establishing a new contract program or evaluating an existing program. Only when these issues have been examined in a number of systems over time can we get an objective, accurate measure of the cost effectiveness and quality of representation in contract programs."

What We Have Learned About Contracting and Competitive Bidding For Indigent Defense Programs

It is now eight years after this article was published and we have learned a great deal about contracting and competitive bidding for indigent defense services. Because of the focus of our professional work, The Spangenberg Group is uniquely able to summarize the issues of contracting and competitive bidding in indigent defense delivery which we hope will be instructive to this Subcommittee, the Congress, the Legal Services Corporation and others concerned about the delivery of civil legal services to low-income persons in civil cases in both a quality and cost effective manner. We believe that this experience on the criminal side should be instructive in considering the issues on the civil side.

In reviewing the work of The Spangenberg Group and other studies that have been conducted on the question of contracting and competitive bidding for indigent defense services, we have reached a number of conclusions. These conclusions are spelled out in the memo that is attached to my testimony today entitled Findings Concerning Contracting for the Delivery of Indigent Defense Services. I have annotated these findings in capsule form to provide examples of various reports, studies or standards which assisted us in reaching these conclusions. We would be happy to provide the complete reports of any of these annotated references upon Subcommittee request.

There are a few comments that I would like to make to the Subcommittee regarding the issue of contracting and competitive bidding in the indigent defense area that I feel need to be highlighted. They are as follows:

- Most of the growth in contracting systems in the past eight years has occurred in small counties (less than 50,000 population) with a limited tax base. These counties have

primarily used the contracting method to cap their overall expenditures for any given year. Cost has been the single most important criterion.

- To our knowledge, there are only two examples in the entire country in the past ten years where a contracting defense program has replaced a staff attorney public defender program. Funding agencies have determined that for many reasons, public defender programs, where they exist, provide higher quality in a more cost efficient manner than a contract defense program. This is particularly true in suburban and metropolitan areas.
- In a majority of contracting systems, competitive bidding does not exist. Rather, the funding source contracts with one private lawyer or law firm in a non-competitive manner.
- The use of competitive bidding places an incentive on weighing costs over quality so that even qualified groups may not have sufficient funds to provide competent representation.
- In many contract systems, over time, the most qualified and experienced practitioners drop out of the system and are ultimately replaced most often by recent law graduates and marginally competent criminal attorneys.
- While the initial cost of a contract system may be less than that of a public defender program and other assigned counsel systems, in most cases, over time, contract system costs rise to a level that exceeds both that of a public defender and assigned counsel system.
- Fixed price contracts, under which contractors agree to accept all appointed cases in a particular jurisdiction for a period of a year for a total fixed price, result in substantial case overload and less than adequate representation to individual defendants.
- Many contract jurisdictions are reporting that it is becoming increasingly difficult to find qualified attorneys to bid.

- Competition in the marketplace, which has been one of the stated purposes of competitive bidding, has not led to efficient, quality legal services. In most cases, over time, the cost has gone up and the quality has gone down.
- Year-to-year competitive bidding has led to substantial administrative cost by the funding source necessary to process the bids and to negotiate the contracts. In some cases, they have resulted in contractors providing services for several months without an executed contract.
- Where contractors are private attorneys and perform indigent defense services on a part-time basis, conflicts frequently arise between the requirements of work for their indigent clients and their fee paying clients.
- Only a small number of private attorneys practice criminal law and thus the pool of attorneys available to bid for indigent defense work is by definition limited.

Many of the concerns stated above have drawn the attention of the courts, state and local bar associations and the American Bar Association. Examples of court action can be found in the enclosed paper.

In 1985, the American Bar Association adopted a resolution relating to the award of public defense contracts. It states as follows:

> BE IT RESOLVED, that the American Bar Association opposes the awarding of governmental contracts for criminal defense services on the basis of cost alone, or through competitive bidding without reference to quality of representation.
>
> BE IT FURTHER RESOLVED, that the awarding of governmental contracts for criminal defense services should, in addition to cost, be based on qualitative criteria such as attorney workload maximums, staffing ratios, criminal law practice expertise, and training, supervision and compensation guidelines.

The American Bar Association has also adopted the Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services which address many of the concerns that I have outlined above. Further, several states including California, Ohio, Washington, Massachusetts and North Dakota have adopted comprehensive standards and guidelines for contracting for indigent defense services. This appears to be the trend in states that continue to use the contracting method.

In my opinion, contracting for indigent defense services will continue to exist in the future, but the system necessitates a comprehensive set of standards designed to assure quality defense services. Further it is my opinion that contracting will be primarily limited to smaller jurisdictions and will not replace existing staff public defender programs.

The ten year experience with contracting for indigent defense services in this country has been a turbulent and controversial one. We have learned a great deal that may well be instructive during the current debate over competitive bidding for civil legal services. What we know and what we have learned would suggest that to assure quality representation for indigent defendants, a comprehensive set of standards and guidelines needs to be prepared and implemented in any contract jurisdiction. When such requirements are established, it has been proven that in most cases, staff public defender programs are the most cost efficient and provide the highest level of quality overall.

I hope that this statement and the paper that follows will be of assistance to the Subcommittee and the Congress.

I stand ready to cooperate with you fully if I can be of any further assistance.

T H E S P A N G E N B E R G G R O U P

Robert L. Spangenberg
President

Patricia A. Smith
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William J. Rose
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FINDINGS CONCERNING CONTRACTING FOR THE DELIVERY OF INDIGENT DEFENSE SERVICES

May 1990

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ANNOTATED FINDINGS

1. **Competitive bidding frequently creates an incentive to weigh costs over quality.**

- See Report of the Blue Ribbon Commission, San Diego County 1986. Findings page 48.

- Indigent Defense Services in Washington, The Spangenberg Group 1988 (Washington Report), Finding 23, page 103.

  "This approach results in fees that may be as low as $15-$20 per case...It can compromise the effectiveness of counsel."

- Assessment of the Indigent Defense System in Oregon, The Spangenberg Group, 1989 (Oregon Report), page 114, 119.

  "'Block grant' (e.g., lump sum) contracts create a conflict between competent representation and economic self-interest. The block grant contract system does not have a proper place in the provision of defense services. - quoting a report from San Diego County Blue Ribbon Commission formed to study the contract system in operation for six years - 1987."

- American Bar Association Standards for the Defense: Chapter V Providing Defense Services (ABA), Standard 5-3.2 (c).

  "The contracting authority should under no circumstances, award a contract on the basis of cost alone."

- Phillips v. Seeley 43 Cal. App. 3d 104 (1974)

  "Competitive bidding for the lowest price tends to produce the least amount of services...clear pressure may

be placed on a defendant to plead guilty. Preliminary hearings may be waived in favor of cost effectiveness. The preparation of motions and arguing them may require more hours than are allotted to remain economically competitive."

- State of Arizona v. Smith. 140 Ariz. 355 (1984)

  The court found that Mohave County's system of selecting counsel for indigent defense contracts, which used as its criteria for selection the lowest annual fee bid, without considering the attorneys' experience, ability or workload, and without limiting the number of clients for which he is responsible, or the hours of work he must perform under the contract, violated the rights of a defendant to due process and right to counsel as guaranteed by the Arizona and United States Constitutions. The court reached this conclusion based on the reasoning that an attorney so over-burdened cannot adequately represent all his clients and be reasonably effective.

- Report and Recommendations: Contract Defense Services, Standing Committee on the Delivery of Legal Services to Criminal Defendants, State Bar of California, 1981 (California Report).

  "Particularly for the benefit of counties which are considering contracting for the provision of criminal defense services for the first time, we feel we should further express our view that in many respects contract public defending is an ill-conceived delivery system and is not the panacea for providing defense services in lean economic times. There is a widely shared view that the process of obtaining and retaining a contract for a fixed term is inimical to the proper delivery of defense

services. A contract defender has no way to retain qualified personnel at low wages without the civil service benefits that district attorney personnel of the same experience and comparable duties in the same courtroom and deputy public defenders in statutory offices in other counties receive, and the resultant turnover harms the contract defender's ability to provide quality legal services."

2. The majority of contract systems with a fixed price contract have developed the system with the primary goal of "capping" the total cost over the contract period.

o Guidelines for Legal Defense Systems in the United States, Draft Report of the National Study Commission on Defense Services, 1976.

"The concept behind competitive bidding is that governments ought to acquire services for the least possible cost. However some jurisdictions which have adopted this model for the awarding of defender contracts have failed to recognize other, more important criteria, such as the importance of legal research in preparing a case, scientific investigation techniques, and other elements which go toward a minimally effective defense, although they may be more costly for the jurisdiction. . . Competitive bidding for the lowest price tends to produce the least amount of services. As a result, it may be prohibitive to conduct the amount of investigation or contract out the laboratory work necessary to prove a person's innocence. Clear pressures may be placed upon a defendant to plead guilty. Preliminary hearings may be waived in favor of cost effectiveness. The preparation of motions and arguing them in court may require more hours than are allotted in order to remain

economically competitive. At stake is a person's liberty and the question of whether or not he has been justly accused. The lowest bidder may not provide the scope of services required for an effective representation." At p. 440."

- Oregon Report, Finding #3, page 110.

  This finding notes the substantial effort undertaken by the Judicial Department to develop cost containment procedures, including: The tightening of requirements and procedures for contracting generally.

- Oklahoma Report, page 29.

  "Typically local judges initiate contract programs because they believe such programs will contain indigent defense costs. If an attorney accepts all of the cases in a county for a flat fee, regardless of the number of cases, the court fund will be insulated form unexpected attorney fees in the event of high caseload or a large number of serious cases."

3. Competition in the marketplace which has been one of the stated purposes of competitive bidding has not led to efficient, quality legal services. In most cases, over time, the cost has gone up and the quality has gone down.

- Oregon Report, Finding 3, page 116.

  "The argument that "competition in the marketplace" will lead to reductions in the cost of indigent defense services has not proven to be the case elsewhere and may be flawed and shortsighted. The level of demand for the constitutionally mandated defense services in question is not subject to change in response to price

fluctuations. The number of defendants that will have to be represented is ultimately beyond the control of the courts, the contractors or the State Court Administrator. Likewise, the level of service that must be provided cannot be compromised in order to accommodate lower funding levels, without raising the possibility of petitions for post-conviction relief based on ineffective assistance of counsel and malpractice suits, as well as costly lawsuits challenging the constitutionality of the system, as have recently been successful in Kansas and Nebraska."

4. In most contract systems, many of the most qualified and experienced practitioners eventually drop out of the system and are ultimately replaced, most often by recent law graduates and marginally competent criminal attorneys. Furthermore, many contract jurisdictions are reporting that it is becoming increasingly difficult to find qualified attorneys to bid. In some contract systems, highly qualified attorneys participate for one or two years and then drop out because they are unable to compete economically if they continue to provide quality services.

o Washington Report, Finding 28, page 104.

"Funding sources in Washington report that it has become difficult to find qualified attorneys to bid on contracts. Some experienced attorneys indicated they no longer bid on low fee contracts because they do not even cover overhead. Judges expressed concern that some contracts are being handled by recent law graduates to gain experience and who drop out of the system once they have joined it."

- Oregon Report, Finding #4, page 119.

  "It is our concern that...the system may continue to be underfunded, attracting many inexperienced and perhaps incompetent lawyers to submit bids which may seriously compromise the quality of representation provided.

- Oregon Report, Finding #5, page 123.

  "...increasing numbers of individual qualified private attorneys are withdrawing their names from lists of those willing to accept criminal appointments at current rates of compensation."

- Washington Defender Association, Standards for Public Defense Services (WDA Standards), Standard III: Guidelines for Awarding Defense Contracts, Commentary, page 10.

  "Inexperienced attorneys with no office overhead or very young attorneys with no family obligations may indeed be able to submit lower bids than their more experienced colleagues, but if the guarantee of effective counsel is to have meaning, attorneys receiving contracts for public defense must have adequate experience."

5. While the initial cost of a contract system may be less than that of a public defender program or other assigned counsel system, in most cases, contract system costs rise over time to a level that exceeds both that of a public defender and assigned counsel system.

- Oregon Report, Finding 4, pages 115-116.

  "The argument that 'competition in the marketplace' will lead to reductions in the cost of indigent defense services has not proven to be the case . . . and may be flawed and short-sighted . . . the level of service that

must be provided cannot be compromised in order to accommodate lower funding levels, without raising the possibility of petitions for post-conviction relief based on ineffective assistance of counsel and malpractice suits, as well as costly lawsuits challenging the constitutionality of the system, and have recently been successful in Kansas and Nebraska."

6. Fixed price contracts, under which contractors agree to accept all appointed cases in a particular jurisdiction for a period of a year for a total fixed price, result in substantial case overload and less than adequate representation for individual defendants.

- State of Arizona v. Smith, 140 Ariz. 355 (1984), Supra, page 4.

- NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (NLADA), Guideline III-6.

  The contract should specify a maximum allowable caseload for each full-time attorney or equivalent who handles cases under the contract.

- ABA Resolution, Criminal Justice Section 1985. Approving NLADA guideline above.

- New Hampshire Revised Statutes Annotated, Ch. 604-B:6 Allocation of Cases.

  New Hampshire statute requires a plan for caseload limitations for defense attorneys serving under contract in accordance with professional standards under the code of professional responsibility. The plan must be approved by the state judicial counsel.

- Rules of the Ohio State Public Defender Commission, Rule 120-01-12(E)(2), Elements of a Contract for Indigent Defense Services.

  "Scope of Contract. The contract shall specify the categories and percentages of indigent cases in which the contractor is to provide services..."

- Washington Defender Association Standards, Standard III: Guidelines for Awarding Defense Contracts.

  "Contracts which do not address the issues raised in these standards - reasonable caseloads, adequate support staff and minimum experience levels, to name just three - cannot be expected to deliver the effective representation mandated by the state and federal constitutions."

- California Report, Recommended Standards, Recommendation (2) with comment.

  "Contracts should provide that the contracting attorney is not expected to accept an unlimited number of cases for a flat fee without an escape clause for extraordinary expenses or unforeseen increases in caseload or legal responsibilities (new cases or statutes increasing the caseload or workload).

  Comment

  Such a provision would help to assure that the contracting attorney will spend adequate time in the preparation of cases, use appropriate experts in the preparation of defenses, file all appropriate motions, and pursue all meritorious defenses. Needless to say, the expected normal caseload should be known before the contract is executed."

7. Many contract programs have no provision for funds for expert witnesses, investigation and other necessary costs of litigation and thus provide a disincentive for the contractor to provide these services which they must pay for out of their own pocket.

- California Report, Exhibit A, page 2.

  "Incompetent representation results from inadequate investigation, preparation, and trial of criminal cases. Such incompetence may be reflected in the use of inexperienced attorneys, inadequate time spent on cases, failure to use experts in preparing defenses, failure to bring meritorious defenses, and failure to declare conflict of interest in appropriate cases - failures which tend to increase as the monies allocated for funding criminal defense services decreases."

- Rules of the Ohio State Public Defender Commission, Rule 120-01-12(E)(6).

  "Support staff, investigators and forensic experts. The contract shall provide for the employment of a support staff or secretaries and non-legal personnel for the office. The contract should also specify that adequate funds be provided for investigators, social workers, mental health professionals, and other forensic experts necessary to provide competent representation. No contract clause should interfere with the contractor's selection, supervision, and direction of these persons."

- Washington Report, Finding 25, page 103.

  "The low fee, low bid contracts . . . typically do not provide for support services, expert witness fees or other costs of litigation. The result in many cases is that contract attorneys may either forego these services or be required to finance them out of their own pockets.

A number of judges complained about this problem and suggested that the quality of service suffers . . ."

- Oklahoma Indigent Defense Systems Study, The Spangenberg Group, 1988 (Oklahoma Report) Finding 8, page 53.

  "While there are very few contract defense programs in Oklahoma, most of these contracts require attorneys to handle all cases in the country for a fixed annual amount.

  There are very few contract defense programs in Oklahoma, although their number has increased slightly over the past few years. Those that specify a flat annual fee for all indigent cases in a given year present some serious problems. There do not appear to be provisions in these contracts for expert witnesses or other litigation expenses; there are no caseload standards; and there are no provisions for additional funds to pay attorneys hired when the contract attorney has a conflict of interest."

- State of Arizona v. Smith, 104 Az. 355 (1984).
  As noted earlier, the court found that Mohave County's bid system for indigent defense contracts did not meet national standards and therefore militated against adequate assistance of counsel because, among other reasons, the system failed to provide for support costs for the attorney, such as investigators, paralegals and law clerks.

8. Few contract systems take into account the specific qualifications or experiences of the attorneys who bid.

- Report of the Blue Ribbon Commission, San Diego County, 1986, Findings page 48.

"The present contract system is inadequate to ensure quality representation. First, although the two-step bidding process instituted in 1983, whereby groups are first screened to determine qualifications and, if found qualified, are allowed to participate in the bidding process, is an improvement, it is still deficient. The determination of qualifications is subjective and is done by persons who have neither the time nor the resources to conduct a thorough investigation."

- California Report, page 2.

"When a county government focuses exclusively or primarily upon cost as a factor in contracting for criminal defense services without fully considering the lawyer's experience, reputation, and ability and commitment to provide quality representation to a large number of clients, it runs a great risk of selecting a defender whose representation of clients may be on the litigable borderline of competence."

- State of Arizona v. Smith, 104 Az. 355 (1984); Memorandum Decision of the Court of Appeals, Division One, filed 14 July (1983), page 14.

The court found that Mohave County's bid system for indigent defense contracts did not meet national standards and therefore militated against adequate assistance of counsel because among other reasons "The system fails to take into account the competency of the attorney. An attorney, especially one newly admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned . . ."

- Washington Defender Association Standards (WDA), Standard III: Guidelines for Awarding Defense Contracts.

  "Contracts should only be awarded to a) attorneys who have at least one year's criminal trial experience in the jurisdiction covered by the contract (i.e., City and District Courts, Superior Court or Juvenile Court), or b) to a firm where at least one attorney has one year's trial experience."

- WDA Standard IV - Minimum Qualifications for Public Defense Counsel, Commentary page 11.

  "Effective representation can only be provided by attorneys experienced in the type of case in which they appear.

  Inexperienced attorneys can not only deprive their clients of their right to effective counsel, they also create problems for the criminal justice system itself. Inexperienced attorneys are less able to effectively negotiate with prosecutors, thus lengthening the time needed to resolve pre-trial issues. They are less efficient in bringing cases to resolution and many burden the court with irrelevant issues.

  The practice of criminal law has become highly specialized in recent years. Only attorneys who possess effective trial advocacy skills and have a thorough knowledge of substantive and procedural law can be expected to competently represent persons accused of crime."

9. **From a cost standpoint, assuming the requirements of national standards, public defender programs are less costly than contract systems.**

- California Report, page 2.

  "What [a] county initially saves by disregarding the question of professional competence could be offset many times by other costs such as defending civil lawsuits against it and its defender and the cost of retrying criminal defendants whose convictions are reversed on the ground of the defender's incompetence. For fiscal and public policy reasons, county governments should instead seek to provide the quality of representation afforded by diligent, ordinarily prudent lawyers in criminal practice."

10. Competitive bidding generally creates instability in the indigent defense system. Year-to-year competitive bidding has led to substantial administrative cost by the funding source necessary to process the bids and to negotiate the contracts. In some cases, they have resulted in contractors providing services for several months without an executed contract.

- Oregon Report, Finding 4, page 114.

  "The negotiation of contracts on a year-to-year basis has fostered an environment of instability and inefficiency and has kept the indigent defense system in a state of crisis.

  It has severely limited the possibility of long term planning. Contractors are not sure what terms they will be asked to comply with, what resources will be made available to them, what staff they will be able to retain or even whether they will be able to participate in the next contract cycle."

- Report of the Blue Ribbon Commission, San Diego County 1986. Finding 6, page 49.

"The contract system. The contract system is an inherently ineffective and unstable method of providing indigent defense representation. The competitive bidding process, even when groups are initially screened for qualifications, places cost over quality of representation."

- NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services. Guideline III-4.

"For the purposes of establishing independence and stability, a two year contract period is an absolute minimum."

Note: Commentary to the standard implies a 4-6 year term is more appropriate. However concerning the contract system in San Diego, the Blue Ribbon Commission wrote in 1986 about three year contracts used by the system: "because of the possibility that existing groups will be underbid after their three year contracts have expired and the fact that due to inadequate contract rates, qualified groups will leave the indigent defense system, the contract system is inherently unstable."

11. Studies in at least four states (Massachusetts, Virginia, Oklahoma and Alabama) have reported that private attorneys both in assigned counsel and contract systems have provided less than the minimum requirements of representation due to their stated lack of adequate compensation. These data in each of the four states include self reported information from the attorneys providing the representation.

- Oklahoma Report, Finding 2, page 115.

  "Eighty-seven percent of the judges, 92% of the defense attorneys, and 49% of the prosecutors who responded to a mail questionnaire claimed that fees are not sufficient to attract and retain qualified defense counsel. Sixty-two percent of attorneys and 26% of the judges responding to the same questionnaire also claimed that low fees have had an effect on the quality of representation."

- See also, Review of the Indigent Defense System in Alabama, The Spangenberg Group on behalf of the American Bar Association Bar Information Program, March 1988.

- A Study of the Indigent Defense System in Oklahoma, The Spangenberg Group, for the Oklahoma State Bar Association, 1988.

- Projecting Costs for Various Indigent Defense Systems in Virginia, The Spangenberg Group on behalf of the American Bar Association, Bar Information Project, 1985

- Analysis of the Bar Advocate System in Massachusetts, Patricia Smith, William Rose, et al., for the Committee on Public Counsel Services, 1985.

12. Contract systems have grown substantially in the past five years. Eighteen states now have one or more contract programs. Most of the growth has resulted either in the replacement of assigned counsel systems by contract systems or the establishment of contract systems in public defender jurisdictions to handle the "conflict" cases of the public defender program.

- Oregon Report, 1989, page 22.

  "The number of contract programs has increased in Oregon by 26% from 1987-88 to 1988-89. This increase has occurred primarily in the number of law firm consortium contracts which alone increased by 24% of this period. In FY 87-88, the State Court Administrator entered in 43 contracts with 39 contract groups. In FY 88-89, there were 53 contracts with 49 different providers."

- See also, Washington Report.

  Contract programs came into use in Washington in the late 1970's. Now 22 of the 39 counties in Washington (56%) deliver defense services primarily through contracts. There are at least 300 different contracts currently in use in Washington.

- Criminal Defense for the Poor, 1986, U.S. Department of Justice, Bureau of Justice Statistics Bulletin, (1988).

  Eighteen states now have at least one contract program. Between 1982 and 1986, the use of contract programs grew by two thirds - 7% of all counties reported using contracts in 1982; 11% reported using contracts in 1986.

13. **There is a clear trend among some statewide public defender programs to establish contract programs, principally in less populous parts of the state where staff programs would be more costly.**

- Bureau of Justice Statistics, Criminal Defense for the Poor, 1986.

  This trend is evidenced most clearly in Kentucky, New Hampshire, New Mexico and Vermont.

14. Where contractors are private attorneys and perform indigent defense services on a part-time basis, conflicts frequently arise between the requirements of work for their indigent clients and their fee paying clients.

- Oregon Report, Finding 3, page 116.

  With respect primarily to small contracts with individual attorneys this report found: ". . . the smaller the contract and the smaller the percentage of an attorney's overall practice that it represents, the greater the likelihood that financial and ethical conflicts will arise between the attorneys contract cases and those being handled privately. While this is a concern for contract programs of all sizes, the pressures may be greater on the smaller programs to make inappropriate trade-offs to the detriment of their indigent clients."

- State of Arizona v. Smith, 104 Az. 355 (1984)

  The court found that the Mohave County system of awarding low bid contracts violated the right of a defendant to due process and right to counsel as guaranteed by the Arizona and United States Constitutions because, among other reasons, "No limit is placed on an attorney (see King other paying clients). Therefore, an attorney may be forced to allot his limited amount of time and resources between paying clients and indigent clients or even between different indigent clients."

15. Many contract programs provide little supervision of less experienced attorneys and little or no training.

- Washington Report, Finding 7, page 96.

  "Training is seriously lacking among all indigent defense programs in Washington. With the exception of a few in-house training programs, most often found in public defender systems, there is virtually no training being provided in the state for attorneys appointed in indigent defense cases."

- Oklahoma Report, Finding 7, page 51.

  There are few training programs for court appointed attorneys in Oklahoma.

  Oklahoma is primarily an assigned counsel state but the number of contract programs is increasing. No contract programs evidence meaningful provisions for training or supervising attorneys.

- Report of the Blue Ribbon Commission, San Diego County, Finding 4, page 49.

  "Education and Training. With the exception of [one program], systematic education and training is almost non-existent in the present system."

- Blue Ribbon Commission, San Diego County, ID. at page 50.

  "The decentralized, fragmented nature of the [contract] system coupled with a budget that does not allow for adequate supervisory personnel, severely limits quality control and accountability. Budgetary restrictions also prevent the implementation of an effective training program."

16. Many contracts do not provide specific funds for conflict cases requiring the contracting attorney to pay for a case which is conflicted out. This creates a disincentive for the contractor

to declare a conflict.

- California Report, Recommendation (9), page 5.

  "Contract clauses should avoid creating conflicts of interest between the contracting attorney and the indigent client.

  a) "Conflicts" declared by the contracting attorney should not reduce the contracting attorney's income from the contract."

- Standards of the Ohio State Public Defender Commission, Rule 120-01-12 (E)(a).

  "Compensation of additional attorneys and conflicts of interest. The contract shall contain provision for compensation for additional attorneys where conflicts of interest arise and the contractor is unable to provide representation. The contract may contain provisions respecting other extraordinary circumstances creating an inability to provide representation and necessitating compensation for additional attorneys."

- Oklahoma Report, Finding 8, page 53.

  The study found that Oklahoma indigent defense contracts do not provide specific funds for conflict cases.

[The prepared statement of Mr. Ross follows:]

PREPARED STATEMENT OF L. JONATHAN ROSS, PARTNER, WIGGIN & NOURIE OF MANCHESTER, NY, AND COFOUNDER, BAR LEADERS FOR THE PRESERVATION OF LEGAL SERVICES FOR THE POOR

My name is L. Jonathan Ross. I am a partner in the firm of Wiggin and Nourie in Manchester, New Hampshire, past President of the New Hampshire Bar Association, past President of the New England Bar Association and co-founder of Bar Leaders for the Preservation of Legal Services for the Poor. I appreciate the opportunity to present this statement for the record.

The competitive bidding scheme envisioned by the current staff of the Legal Services Corporation is an ill-disguised frontal assault on the locally controlled comprehensive delivery system that has provided high quality legal services to the poor of this country for the past twenty-five years. Never before has there been a plan so clearly and deliberately designed to get less bang for the buck. Never before has there been a more blatant attempt to bar the doorway to justice for poor people across America.

The competitive bidding proposal envisioned by the LSC staff is a conservative's nightmare. It would abolish local control and local determination of need, centralizing power in Washington bureaucrats, and ultimately in the hands of an LSC President who is chosen by political appointees. What an irony.

The plan envisions multiple suppliers of the same kind of service in the same area, resulting in duplicative administrative and overhead costs. The plan would operate without enunciated standards and in secret. All past experience of similar kind is ignored, and effective local programming is undermined. You must ask yourselves why an LSC staff, appointed during the Ronald Reagan years, would be trying to enlarge government responsibility and centralize authority in Washington when an entire two-term effort was made in the other direction.

Had Congress not intervened last fall, this destructive plan probably would already have been implemented. It was the dream of the previous LSC Board, and it remains the goal of the staff that continues to manage the Corporation today. Here is what they have in mind.

Under the proposed scheme, every grantee on the local level, all national and state support grantees and all other special support grantees would be subject to "competition" every three years. This "competition" would be phased in over a three-year period and would occur regardless of the performance of the grantee or the instability that such a process might cause initially or in the long term.

The current delivery system would be jettisoned; services would be fragmented and balkanized. No longer would LSC fund one provider for each geographic area but at least two and possibly many more. Funding would be equalized solely on the basis of the 1990 Census with no regard to past funding decisions. Providers would not need to be full-service providers; indeed, grants could be awarded to one entity to do only divorces, to another to do only child support. LSC clearly contemplates fragmenting services in some areas. They might, for example, fund only some types of cases or only certain types of representation. They would not assure that there would be a general service provider available in each service area. And these decisions as to what services will be available in any given locality will be made, not by local people on the basis of local needs as has been the tradition and the strength of the existing system, but by LSC bureaucrats in Washington, D.C. They and they alone will determine the selection

criteria for grantees; they and they alone will determine which kinds of representation will be provided.

One of the strengths of the present delivery system is that poor people have a single place to go to discuss their legal needs. They are not called upon to determine how their needs should be defined or what their remedies are. They are not sent to a divorce clinic, a consumer law clinic or a housing clinic and have to figure out, when they may have all of those problems, how to get through a maze of services.

If the type of "competition" that is contemplated here is allowed to go forward, there will be a whole series of cases, extremely important cases, that will never be brought and that need to be brought in order to give a proper measure of justice to all of our citizens. In New Hampshire I serve as guardian of two minors in an action that was filed in the Federal Court on Monday as a class action. It is not the kind of case that any private group is going to petition for funds to bring. My client, a minor, has been in an out of foster homes during her life. During one short period of time when she was living with her natural mother, her mother committed welfare fraud in connection with a New Hampshire food stamp and an AFDC program. Since that time, my client has had a child and is currently receiving AFDC benefits under her own entitlement for her son. My client's mother, who was convicted of welfare fraud, is indebted to the State, and under New Hampshire regulations that are alleged to be consistent with federal regulations, because my minor client was a member of her mother's household at the time of the fraud, her meager AFDC check is being reduced to pay back the mother's debt.

The United States' morality does not visit the sins of the parents upon the children, and yet our State, with apparent concurrence from the federal government, is taking about 10% of this girl's $420 per month income to pay a debt for her mother. My client spends 85% of her grant on housing. It leaves her with precious little for everything else. Who would bring this case under this competitive bidding scheme?

It is ironic indeed that the same package of so-called "reforms" that includes this competitive bidding proposal also calls for increased scrutiny and involvement on the part of local program boards of the activities of LSC's grantees. Under the Corporation's competitive bidding scheme, providers would not even be required to have a local board of directors. Certainly many of the non-lawyer "entrepreneurs," paralegals and legal clinic operations that LSC contemplates funding would not have local governing boards, a majority of whom are appointed by local and state bar associations. Only nonprofit providers that are organized for the purpose of providing legal services to the poor, i.e., current grantees, would be required to have such a board. Nor would providers, other than current grantees, be required to provide for client involvement in the decision-making process of their organizations. In short, experienced providers would be required to maintain their relationships with the local bar and the client community and to receive input and oversight from those groups; new bidders would not. Hardly an even playing field.

There are other problems with the proposed competitive bidding regulation put forward by the Corporation last year. For example, it did not contemplate the development of any substantive criteria

by which potential providers would be judged; applicants would be evaluated strictly on a cost-per-case basis, with no regard for quality or effectiveness. Ignoring the American Bar Association's Standards for Providers of Civil Legal Services to the Poor, LSC would not take into account the capacity of providers to leverage other funds, the effect of competition on pro bono programs or on bar participation, or the ongoing case obligations that providers might have. Nor would LSC take into account the professional qualifications of an applicant's staff, professional development and training, supervision and evaluation, and recruitment of staff, as also required by the ABA Standards. Nor would there be any regard to coordination of services and the relationship of a provider to necessary support services. The LSC proposal expresses no concern for potential conflicts of interest.

The adequacy of a provider's existing offices and administrative structure and necessary overhead and space commitments, as well as the support that a provider might have among the local bar, community leaders, client groups, etc., is ignored in the LSC proposal though required by the ABA Standards. Nor does LSC address the problems of client access to providers, including geographic access, as well as the more subtle but equally significant barriers such as language, the provider's substantive skills and knowledge, ability to communicate and sensitivity to client problems, all of which are emphasized in the ABA Standards. Finally, the LSC proposal does not take into account the cost of, and the need for, eligibility determinations and other screening mechanisms which are essential to any effective delivery system.

In an effort to lend some measure of legitimacy to its inhersntly flawsd proposal, LSC has coms up with the notion of peer review pansls which would ostsnsibly svaluats the work of LSC's competitively selectsd grantsss. These panels, however, would not be selscted on the basis of their knowledge of the delivery of lsgal services to poor people or on ths basis of thsir knowledgs of a particular locality and the nesds of its poor citizsns. Thsy would bs sslsctsd by the LSC Presidsnt, based on criteria of his or her own making. Thsir dslibsrations and rscommendations would bs shroudsd in secrecy and not subject to public scrutiny. Their rscommendations, in fact, would be merely advisory, with ultimats powsr lsft in the LSC Prssident. They ars window drsssing, nothing mors.

This proposal strikes at ths vsry hsart of ths locally controllsd legal services dslivery system that by any objectivs standard has worksd extraordinarily well for mors than two decades. The scheme, as envisioned by the currsnt LSC staff, is without standards, places no valus on the thoroughness or compstsncs of ths lsgal representation ths poor will rscsivs from successful biddsrs, rsmoves all local control and priority sstting from ths servics dslivsry system and leaves it to LSC bursaucrats to dsfins what ars ths "appropriats" kinds and scops of ssrvices for ths poor in sach local area. Furthsr, ths LSC proposal ignorss ths ovsrwhslming proof from criminal dsfsnse contract expsriences, as prsssntsd by Mr. Spangsnbsrg, that "competition," as envisioned by LSC, will insxorably dilute the quality and sffectivsness of lsgal rspressntation whils incrsasing costs. The inevitabls result of a precipitats wholesale convsrsion to ths

kind of competitive bidding system proposed by the Corporation will be a system of civil legal representation for poor people that is vastly inferior and far more costly than the current system.

As a bar leader and practicing lawyer, I am particularly concerned about the effect of the LSC proposals on the working poverty lawyer. Legal Services lawyers in this country by and large are dedicated, competent, hardworking, committed professionals. In each state they operate under some Code of Professional Responsibility or Rules of Professional Conduct. Independent of what the LSC staff may do in Washington, they have professional and ethical obligations to their clients, which cannot be transferred willy-nilly in some bidding process. What happens to the clients when a grantee's money runs short and the lawyer is out of a job? What happens to client confidentiality? What happens when the new people bidding are told to do divorce work only and there are other cases within the existing case load? In many states, the lawyer who used to work for that funded program would have a continuing obligation to complete his representation of the client. If we are here to serve the client, to provide poor people the opportunity to be represented by counsel like anyone else for access to our system of justice, these concerns cannot be swept aside. We cannot create a system that forces lawyers into the dilemma of violating their professional obligations and ethical codes or representation after an office is closed.

A bidding situation that involves private for-profit law firms will be destructive of the lawyer-volunteer effort in this country

to supplement the efforts of LSC grantees. My firm takes an aesignment of cases monthly. In New Hampshire close to 1,000 practicing lawyers, probably close to one half of our active Bar, take pro bono assignments each year. We donate in that process hundreds of thousands of dollars of our professional skill to supplement what New Hampehire Legal Assistance does. You can be sure that if my competitor down the street is being paid to do what I am asked to give away, my willingness and my firm's and other lawyere' willingnese to participate in these programs will drop dramatically.

The lowest bidder who wante this work to make a profit will alwaye be in the eituation with these kinds of caeee of balancing his economic interest against a full effort for the client. It didn't work in criminal defense matters, and it won't work in civil mattere.

That is not to say that there ie no place for competition in a compreheneive legal eervices delivery system; indeed the notion of competition is a compelling one in our free market eyetem. But what ie good for defenee contractors is not necessarily good for thoee from whom we purchaee service instead of airplanee. If I may quote my own Senator Rudman who said a few weeks ago to the new Chairman of the Board of the Legal Services Corporation, "If you think competition ie a good idea, try it somewhere; don't throw the baby out with the bath water."

I agree with Senator Rudman. Before any eyetem of competition ie implemented, LSC should be required to etudy, teet and demonetrate its efficacy through independent evaluation. Before implementation, LSC should be required to develop, in conjunction

with the ABA and others experienced in the field of poverty law, norms of performance against which to measure grantees and criteria for deciding which grantee is to be funded.

An appropriate competitive bidding system would not be based solely on cost but would take into account all critical factors including quality and effectiveness. In an appropriate competitive bidding system all competitors would play on a level playing field and be subject to the same requirements, restrictions, recordkeeping, etc., thus giving no provider any greater or lesser flexibility than current recipients. Competition would only be between existing recipients and other organizations that wish to provide comprehensive legal services and are run by boards of directors appointed by the bar and client organizations. An appropriate competitive bidding system would take into account all of the elements of the ABA Standards in its design and implementation. An appropriate competitive bidding system would preserve the basic delivery system and the concept of local control.

If it is the wisdom of the Subcommittee that some form of competitive bidding should be included in a reauthorization of the Legal Services Corporation, then the Corporation should first be required to develop standards and criteria for the selection of grantees and to thoroughly test and evaluate the plan in the light of the concerns I have discussed. Until such an independent evaluation has been completed, it is premature to go forward with a full scale competitive bidding system.

New England Bar Association

NEW ENGLAND BAR FOUNDATION

High Quality, Competent Legal Representation Versus The Subterfuge of "Competition" In the Delivery of Legal Services to the Poor

A Joint Position Paper on the implementation by the Legal Services Corporation of so-called "competitive bidding" in the awarding of grants and contracts for the delivery of civil legal services to the nation's poor.

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High Quality, Competent Legal Representation Versus The Subterfuge of "Competition" In the Delivery of Legal Services to the Poor

A Joint Position Paper
of the New England Bar Association and the New England Bar Foundation on the implementation by the Legal Services Corporation of so-called "competitive bidding" in the awarding of grants and contracts for the delivery of civil legal services to the nation's poor.

Background

The federally-created and funded Legal Services Corporation (LSC) is now 15 years old. Created, with bipartisan support, through the Legal Services Corporation Act of 1974, LSC was structured to ensure (1) that civil legal services were available nationwide to the country's neediest citizens and (2) that representation of the poor was carried out by locally-controlled non-profit entities overseen by local boards of directors who determined service priorities in conjunction with the local community based on their specific knowledge and understanding of the most pressing legal needs of the poor in that region.

As of 1989, the 15-year-old LSC structure has been developed and nurtured to the point where it involves:

- *approximately 300 local, non-profit legal services delivery entities;*
- *regional training and support centers which provide significant research, printed materials and brief banks, continuing education, substantive expertise in very specific areas of poverty law, and related services -- all of which are designed to increase the quality, efficiency and effectiveness of the local legal services programs (and the private lawyers who work with them) without their having to replicate this expertise within each local LSC grantee;*
- *well-developed linkages, joint programming, and service delivery and referral agreements with the private bar -- primarily through state or local bar associations in a local LSC-funded program's service area -- through which significant pro bono services become a complement and supplement to the available federally-funded legal services.*

Between 1981 and 1989, however, the entire concept of federally-funded legal services, as well as the structure through which these services have been delivered, came under intense

attack from the Reagan administration -- an administration which came to Washington with the goal of defunding and dismantling the Legal Services Corporation. Failing to achieve these objectives through the appropriations process,[1] the administration sought to appoint to the 11-member LSC Board of Directors like-minded people who were also committed to carrying out the policy of significantly altering or dismantling the LSC structure and service scope -- through funding reductions and a wide variety of regulatory and administrative means. The President did, in fact, succeed in fashioning a LSC Board majority which worked hard to achieve these goals.

The proposal to remove all legal services funds from existing local grantees and rather to put all LSC-funded services out for "competitive bid" is one of the most profound LSC "restructuring" initiatives to have come from this Board. And, the initiative has been kept alive in Congress through intensive lobbying from long-term detractors of Legal Services, especially from representatives of agribusiness and others who have often been on the losing side of civil lawsuits brought by legal services lawyers on behalf of the poor.

Introduction

After monitoring closely for the past several years the efforts of the Legal Services Corporation leadership to debilitate or altogether dismantle the existing national system for rendering civil legal services to the poor, the New England Bar Association and the New England Bar Foundation believe that the Legal Services Corporation proposal to completely replace the existing LSC grantmaking process with a system of "competitive bidding" is an integral part of these destructive efforts.

• While recognizing that the whole notion of "competition" has an honored and valued place in American society, the Association and Foundation nonetheless assert that the "competitive bidding" process LSC advocates is a virtually standardless one which (1) places no value on the thoroughness or competence of the legal representation the poor will receive from successful bidders; (2) removes all local control and priority setting from the service delivery system and leaves it to LSC bureaucrats to define what are the "appropriate" kinds and scope of services for the poor in each local area; and (3) ignores all proof from criminal defense contract experiences that "competition," such as LSC proposes, inexorably dilutes the quality and effectiveness of legal representation, often below constitutional standards.

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[1] For Fiscal Years 1982-1988, the Reagan administration strongly urged zero funding for the Legal Services Corporation. During the early "honeymoon" era, Congress acceded to diminished funds (the LSC appropriation went from $321 million to $241 million in 1982 and has slowly been restored as far as $308.5 million as of FY 1989), but at the same time Congress also continued to embrace firmly both the concept and original purposes of the Legal Services Corporation Act and the overall service delivery structure it created.

The New England Bar Association and the New England Bar Foundation, therefore, as set forth in more detail below, strongly oppose the efforts of legal services foes to institute wholesale a "competitive bidding" scheme as a total replacement of the nation's current legal services delivery system and particularly oppose any attempt to commercialize the national commitment to equal justice for the poor. The Association and Foundation believe that awarding legal services grants through "competitive bidding" will undermine the legal services delivery system and will impair local service providers' ability to leverage resources, attract and retain talented staff and maintain a coordinated, economical and effective mechanism for meeting the poor's legal needs. "Competitive bidding" will also wrest decision-making power about legal needs and representation scope from local boards, communities, and clients and will transfer this power to Washington-based bureaucrats who possess neither the insight nor the standards to determine what services are most essential to the poor of a locality and which competitors are best suited to provide these services.

The Association and Foundation further question (1) whether LSC could, at a reasonable cost, develop the expertise required to administer and evaluate such a complex program effectively and (2) whether such unique and individualized services involving the attorney-client relationship and case-by-case judgments about the scope of services and potential legal remedies -- as contrasted with government contracts for standardized tools or machine parts -- can or should be put out for competitive bid at all.

The 1988 "Competitive Bidding" Scheme for Legal Services Was Spawned in a Hostile Atmosphere

Several factors intersected in the late 1980's to bring the concept of "competitive bidding" for Legal Services Corporation grants to the forefront. First, long-term LSC Board Chair W. Clark Durant III issued a sweeping policy statement in early 1987 advocating that the existing Legal Services Corporation be replaced with a system in which "unlicensed entrepreneurs" could rise up in the marketplace to represent the poor (at a vastly reduced cost). Mr. Durant proceeded to expound on and vigorously promote this viewpoint in the media and in a variety of forums across the country. He labeled his idea an essential "reform" for legal services. (Mr. Durant's many anti-legal services lobbying activities ultimately prompted many, including the President of the American Bar Association and a group of 10 U.S. Senators, to accuse him of conflict of interest and malfeasance in his fiduciary duty to LSC and to call for his ouster.) Second, faced with seven successive budget battles in which Congress had soundly rejected a recommendation of zero funding for LSC, the President, in his eighth budget, tried a different tack. He included some funding for LSC as long as the agency were significantly "reformed." At the same time, the "privatization" of government services, a popular concept of the Reagan era, was still being lauded and promoted. (This was also a time when many stories about vast cost overruns and waste in defense purchasing -- which supposedly could be cured with more "competitive bidding" -- were prominent.)

Durant's -- and others' -- lobbying for "reforms" in legal services for the poor reached a "fever pitch" in the summer and fall of 1988, including a Durant appearance on Rev. Pat Robertson's 700 Club television show. 700 Club viewers were urged to telephone the White House to call for a veto of the entire $15 billion Commerce, Justice, State Department appropriation bill (which contained LSC's $308 million appropriation) if the bill did not mandate the "reforms" in legal services delivery which Clark Durant so strongly advocated. This veto campaign, well-orchestrated by legal services foes, also emerged vigorously in the House of Representatives itself. Therefore, it was in this atmosphere, in October, 1988, that a House-Senate Conference Committee compromised on the matter of the "reform" of legal services for the poor. The accepted "reform" was "competitive bidding."

Specifically, without further defining the words or objectives, the Committee added, and Congress adopted, a compromise provision in the 1989 (and also the 1990) appropriation for legal services which requires a new Legal Services Corporation Board to "develop and implement a system for the competitive award" of grants and contracts.

Even in the heat of intense anti-legal services lobbying, however, Congress could not quite justify allowing the existing LSC Board, whose hostility to its own funded programs was gaining increasing notoriety both in Congress and throughout the legal establishment in the country, to have any hand in implementing this "reform." Republicans and Democrats alike did not want this lame-duck group to develop any more legal services policy. Therefore, the appropriations language directed development of "competitive bidding" only after the LSC Board was replaced by President Reagan's successor and confirmed by the United States Senate.

How Legal Services Works Today: A Closer Look At What Will Be Lost If the Current System Is Replaced By a System of Unconnected Private Contractors

For the past 25 years (through the Office of Economic Opportunity, and then LSC), the federally funded program of legal services for the poor has been built around a system of local programs supplemented by the private bar and such other specialized services as may be required. In each geographical area to be served, the Legal Services Corporation funds one primary provider. This local program, a non-profit entity, is controlled by a local board of directors which determines local needs and service priorities.

Local program efforts are enhanced by a variety of training and back-up services. In New England, for example, a regional training center helps programs meet the training needs of their staff. Likewise, a regional computer project provides low cost computerized legal research and technology advice to each program. And, state and national back-up centers provide litigation support to local program attorneys and private pro bono practitioners.

This comprehensive, coordinated delivery system has worked exceedingly well in fostering and expanding high quality legal services to the poor. It is this system which en-

ables local programs to leverage millions of dollars in other funding, thereby expanding the number of clients served. In every New England state, for example, local programs receive federally-appropriated Administration on Aging funds to represent socially and economically disadvantaged senior citizens. These grants, administered by the states, require a local financial match. Because of the similarity in purpose between these grants and those made by LSC, local programs are able to combine the grants (match) to expand the population served. Local programs receive a variety of other funds as well, ranging from government grants to serve the disabled and the homeless, to general purpose Interest on Lawyers Trust Accounts (IOLTA) and United Way allocations. In many New England programs, these other funds account for over 50% of local program funding.

Programs are able to raise such funds for several reasons. They have a proven track record; they employ experienced lawyers; they can demonstrate economic, coordinated and efficient delivery of services; and they are accountable to the local community.

The current delivery system enables local programs to leverage human resources as well. Nearly every program is able to attract significant numbers of volunteers; many have internship projects with local law schools. The largest contribution comes from the private bar with whom programs have developed strong partnerships to serve the poor. By establishing pro bono projects, local programs have greatly increased the number of clients served. In New Hampshire, for instance, nearly 50% of the eligible Bar participates in the Pro Bono Program, handling over a thousand cases a year.

The current delivery system is successful because it also encourages innovation and sharing of ideas. Local programs are able to draw upon back-up centers and their counterparts in other cities for new ideas and advice. In New England, project directors and litigation directors meet quarterly to share information on a variety of subjects ranging from substantive legal issues to questions about legal technology, lawyer supervision, and financial and managerial concerns. Directors and staff are in frequent communication with their peers in other programs. This network of providers, sharing common goals and concerns, enhances the efforts and excellence of each program.

A very important part of the delivery of legal services to the poor is local control. Because the legal system is an adversarial one, legal services for the poor will always be controversial. So, it is imperative for their survival that programs be accountable and responsive to the public. By requiring local boards of directors to set priorities (LSC Act, Sec. 1007), the current system provides a mechanism for local determination of needs and evaluation of results. It is this local control that has set legal services apart from so many other programs and which has enabled it to maintain public accountability and support.

These strengths -- these accomplishments, nurtured over the past twenty-five years -- will be severely undermined by the proposed commercialization of the nation's commitment to equal justice.

"Competitive Bidding" Will Undermine the Effectiveness of Federally Funded Legal Services

A proposed (and much-revised) Legal Services Corporation regulation on "competitive bidding," published in May, 1989, gives a good indication of the misguided direction in which advocates of "competitive bidding" want to proceed. Under the regulation, the Corporation would first define the "service areas" to be put out to bid. These service areas need not coincide with the current delivery system geography. The Corporation could decide that a statewide program, like Maine, is too big and carve it up into four, five or as many service areas as it wants. It could then award two or more contracts in each area. Client representatives have asked LSC repeatedly how -- in its "competitive bidding" system -- individual poor people would know where to go for legal help.

The disruption proposed for the current system is increased by the fact that it is not clear for what the contractors would be bidding. Bidders would be instructed to detail the types and number of cases they would undertake and to specify their "objectives," but the Legal Services Corporation would decide whether the cases were "appropriate." And, whether the Corporation would even consider awarding contracts for other traditional legal services activities, such as community legal education and client outreach, is not stated.

Similarly unclear are the criteria the Corporation would use to choose the best bids. The proposed LSC regulation sketches a few factors but concludes that these general selection criteria may be changed with each solicitation.

Administration of this shifting criteria would be carried out through a "peer review" process. Typical of past Corporation efforts, the "peers" need not have any experience with the delivery of legal services to the poor nor any knowledge of local conditions, and the LSC President may ignore the review in any event. (The proposal also seems to indicate that LSC would view someone with direct legal services staff or management experience as having a "conflict of interest" in the "peer review" process.)

The specific LSC proposal leaves many questions unanswered. But, the Corporation's overall lobbying efforts to promote "competitive bidding" -- including its published regulation -- make it crystal clear that "competition" has become a guise for destroying the effectiveness of local legal services programs. Instead of building legal services around the solid and successful foundation of one primary non-profit provider in each geographical area, "competitive bidding" will establish a balkanized, fragmented set of private contractors lacking in accountability to their local communities. This approach will lack all the strengths of the current system and suffer all the significant problems already witnessed with contract systems in the criminal defense field.

"Competitive Bidding" Has Been Problem-Ridden In the Criminal Defense Field

Experience with "competitive bidding" in the criminal defense field strongly cautions against introducing this approach to civil legal services for the poor. "Competitive bidding" for criminal defense services has led to less effective public defender programs and resulted in higher costs, lower quality and substantial disruption in the indigent defense system. Speaking to a Senate Committee on May 2, 1989 about the push for "competitive bidding" at LSC, American Bar Association President Robert D. Raven said, "The history of similar approaches in the criminal defense field has demonstrated that this approach is problem-ridden and, in my view, a failure."

Numerous studies in the last ten years of the provision of criminal defense and juvenile representation of the poor have resoundingly upheld Raven's view. When looking at competitive contract systems, such studies have found:

- Competition in the marketplace, which has been one of the stated purposes of "competitive bidding," bas not led to efficient, quality legal services. In most cases, over time, the service cost has gone up and the quality has gone down.

- While the initial cost of a contract system may be less than that of a public defender program or other assigned counsel system, in most cases, contract system costs rise over time to a level that exceeds both that of a public defender and assigned counsel system.

- In most contract systems, the most qualified and experienced practitioners eventually drop out of the system and are ultimately replaced, most often by recent law school graduates and marginally competent criminal attorneys. Furthermore, many contract jurisdictions are reporting that it is becoming increasingly difficult to find qualified attorneys to bid. In some contract systems, highly qualified attorneys participate for one or two years and then drop out because they are unable to compete economically if they continue to provide quality services.

- "Competitive bidding" generally creates instability in the indigent defense system. Year-to-year "competitive bidding" has led to substantial administrative cost by the funding source necessary to process the bids and to negotiate the contracts.

- Studies in at least four states (Massachusetts, Virginia, Oklahoma and Alabama) have reported that private attorneys both in assigned counsel and contract systems have provided less than the minimum requirements of representation due to their stated lack of adequate compensation. These data in each of the four states include self- reported data from the attorneys providing the representation.

- The Arizona Supreme Court, in State of Arizona v. Smith (140 Ariz. 355 [1984]) found that the criminal defense contract system used by the county in question, which had selected its contractors on the basis of low bid and without regard for attorney

experience, abilities or workloads, was a per se denial of sixth amendment rights. The court said, "The system fails to take into account the competency of the attorney. An attorney, especially one newly admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned. . . ."

- As early as 1974, a California appellate court said of "competitive bidding" for criminal defense contracts, "Competitive bidding for the lowest price tends to produce the least amount of services. . . . clear pressure may be placed on the defendant to plead guilty. Preliminary hearings may be waived in favor of cost effectiveness. The preparation of motions and arguing them may require more hours than are allotted to remain economically competitive." (Phillips v. Seeley, 43 Cal. App. 3rd 104 [1974]).

These findings are not a surprise to those close to the defender arena. They are why states like New Hampshire have moved away from a contract indigent defense system to a staffed public defender program, supplemented by private attorneys only where conflicts of interest so necessitate. And even in the conflict situation, New Hampshire is considering a second public defender program to replace the contract system.

The diminution of quality, increase in cost and disruption caused by "competitive bidding" in the indigent defense field are likely to be even worse in the area of civil legal services where there is no constitutional guarantee of adequate representation. Lacking constitutional underpinnings, the nation's civil legal services program for the poor has always been terribly underfunded and survives today in relative good health only because it is organized well and has learned how to leverage other resources, attract dedicated staff, and utilize what it has efficiently and effectively. The imposition of so-called "competitive bidding" will fragment this organized structure, diminish the capacity of local programs to leverage financial and human resources, add to its cost and reduce its quality and effectiveness.

"Competitive bidding," either in a geographical or piecemeal basis (e.g. divorces, evictions) will result in a multiplicity of dissimilar providers, their only common goal being their own survival or profitability. Forced to compete with each other, they will lack the incentive to share ideas and resources for the common good of their clients. They will be divorced from each other and the support systems (assuming they survive) which now serve all programs and help them provide effective services.

Breaking up the current delivery system will also diminish the resources available to serve the poor. Local programs will find it increasingly difficult to leverage other resources and contract providers will most likely not be interested. Working relationships with local government, United Ways, law schools, and community groups, built over the decades, will be severed as current providers are replaced or pieces of their work let out to private, for-profit bidders. These are tragic consequences when the unmet need for civil legal services is already so great.

"Competitive bidding" will also weaken the tremendous contributions made by the private bar. When lawyers can bid to get paid for serving the poor, there will be tremendous disincentives for others to contribute free services to supplement the work of the successful for-profit bidder(s) and pro bono efforts will slacken.

As in the defender field, "competitive bidding" will add to the total cost of the system. Numerous small contracts will lead to administrative overlap and excessive overhead expenses for the contractors as well as the Legal Services Corporation. Preparation of bids and negotiation of contracts will take time and money away from client service and foster an environment of instability. Contractors will find it impossible to undertake the kind of careful, long-term planning necessary to develop competent staff, make capital investments and maintain effective delivery systems. As one indigent criminal defense study reported,

> Contractors are not sure what terms they will be asked to comply with, what resources will be made available to them, what staff they will be able to retain or even whether they will be able to participate in the next contract cycle.
>
> Assessment of the Indigent Defense System in Oregon. The Spangenberg Group, 1989, at 14.

The disruption and concomitant dilution of quality caused by "competitive bidding" will be matched in its harm only by the havoc caused by the destruction of local control. By permitting the Legal Services Corporation to determine what services will be put out to bid, decision-making over which local needs are to be met is transferred to Washington. The potential for abuse in this approach is clearly demonstrated in the Legal Services Corporation Board's adoption of a regulation prohibiting local programs from undertaking voting rights litigation and the zealous efforts of the LSC President to mandate that child support enforcement be a top service priority for all grantees. The determination of poor people's most pressing legal needs in any given community should not be dictated by the political agenda of a Washington Board of Directors or its appointed officers but rather by an honest service priority assessment made by locally accountable boards.

Giving the Corporation, through the "competitive bidding" contractual process, even more power to decide what services are provided opens the door to even more abuse. Even assuming a less politicized national LSC Board than the one in place from 1985-1989, the very process of letting contracts from Washington erodes the local accountability necessary for a healthy legal services program.

Conclusion

The New England Bar Association and the New England Bar Foundation are strongly committed to the nation's promise of equal justice. The Association and Foundation believe that the largest impediment to the achievement of that goal is not the lack of competition in legal services, but the lack of resources combined with the lack of positive, professional leadership and vision at LSC itself. "Competitive bidding" will do nothing to assist the nation

in meeting the civil legal needs of the poor. To the contrary, it will undermine a system which has produced remarkable results.

The intensive lobbying of both LSC personnel and other opponents of Legal Services for the implementation of "competitive bidding" is nothing more than a subterfuge for efforts to dismantle or cripple the effectiveness of the nation's legal services programs. As such, it is arrogant and disrespectful of the law and poor people's needs. Congress must halt this folly and redirect the Corporation's attention to enhancing the national system of legal services for the poor rather than destroying it.

Mr. FRANK. Let me ask a couple of questions, and both of you fellows feel free to answer.

I gather what you are saying is that once you move from a kind of culture of a staff system and, inevitably, with competitive bidding you are getting back into the fee-for-service notion, that it is just going to cost you more. That structuring it so that lawyers are working as employees is just always going to be a cheaper way to do it than if you get into this kind of fee-for-service system.

Mr. SPANGENBERG. That is absolutely true. There is another point too, and that is we are talking about organizations that have large staffs in many cases in metropolitan areas. In those metropolitan areas of this country that have looked at competitive bidding for indigent defense no one has come in to bid. Who is going to put an organization of 50, 60, 75 lawyers together?

Mr. FRANK. What is the typical duration of a contract in the criminal area?

Mr. SPANGENBERG. One to 2 years.

Mr. FRANK. I am wondering if the staff can help me. In the competitive bidding proposals we have gotten, say from Legal Services Board, what was the duration? Does anybody remember what the duration was?

Mr. Ross. Every 3 years.

Mr. FRANK. Three years I am told. That means every 3 years, theoretically, the support staff is at risk as to its employment? And you also point out the turnover problem, that is the second one, which is, if you were talking about an ongoing organization, someone leaves, he or she simply turns over his or her case and you, obviously, try to minimize that. As people know they are leaving, they take on new cases, they try and wrap them up. There is an inevitable passing on of the baton but it is to a fellow employee in the same workplace.

Here what you are saying is my contract expires and I have got an appeal pending, and here it seems to me is totally analogous—in fact, the civil cases are at least as likely to be pending as the criminal cases, maybe longer. given the nature of who gets priority in our courts, the carryover is likely to be greater, if anything, in the civil cases. A whole new organization might come in and you start from scratch there.

Mr. SPANGENBERG. In the meantime your money has run out.

Mr. FRANK. Right.

Mr. ROSS. In some cases, Mr. Chairman, it is even worse than that. Because the proposal from LSC at the moment is that you have at least two providers in each area and that Washington set the priorities. And those cases may not be in the new bidded priorities, so there may be nobody to take over those cases.

Mr. FRANK. Although I would assume they would say that they would agree that someone would at least have that obligation.

But let me ask the one other point that I had. You have said that some of the counties that had been doing it found they couldn't continue it. Could you give me a trend line? I mean, how many of them, what number have abandoned it? Is it still a growing trend or has it been stabilized or reversed?

Mr. SPANGENBERG. Well, one of the things that is happening, Mr. Chairman, is in the very small counties where the caseload is so

small that it would not justify a staff program, the counties—I am talking, say, counties of 10,000, 15,000 and 20,000, of which you know there are hundreds and hundreds in this country—what they are doing is——

Mr. FRANK. I try not to visit any of them, so I am not that, first-hand, familiar with them.

Mr. SPANGENBERG. OK. They contract with an individual lawyer in that community——

Mr. FRANK. Well, that is a separate issue.

Mr. SPANGENBERG [continuing]. On a noncompetitive basis.

Mr. FRANK. I understand.

Mr. SPANGENBERG. And they call that contracting. That is something different.

Mr. FRANK. And that wouldn't be comparable to Legal Services because the Legal Services—I mean again you, fortunately or unfortunately, there is not the constitutional requirement that you provide a lawyer in a civil case as there is in a criminal case. So in those cases in Legal Services people would just, unfortunately, be out of luck.

Mr. SPANGENBERG. That is right. So that is something entirely different.

Mr. FRANK. But where there was—I agree. The relevant comparison is where there was a staff operation which was replaced by a competitive bidding, what has the trend been in terms of that?

Mr. SPANGENBERG. Interestingly enough, Mr. Chairman, as far as we know there are only two examples in the entire country in the last 10 years where a staff public defender program has been replaced by a contracting program, and in neither of those instances was it by competitive bid. The county just decided we don't want that public——

Mr. FRANK. Well, then the trend to competitive bidding, that went where there was no—where it was just individual appointments by judges?

Mr. SPANGENBERG. That is right.

Mr. FRANK. Then what is the basis for a cross comparison?

Mr. SPANGENBERG. Pardon me?

Mr. FRANK. In other words—all right, then I may have misunderstood. I thought we had a comparative basis. That people had been doing it with a staff and they went to competitive bidding and it was more expensive. We are talking about comparable county staff versus competitive bidding in the same county?

Mr. SPANGENBERG. Exactly. Exactly.

Mr. FRANK. We don't have much experience of people going from the one to the other in the same entity.

Mr. SPANGENBERG. We don't have much experience with staff public defenders going out of business and being replaced by contracting, but we have a lot of experience in I think a lot greater detail in terms of funding on the criminal side than we do on the civil side. Adjoining counties, for example, where you have the assigned counsel or contract and public defender side by side.

Mr. FRANK. Agreed. I am sorry. I have just corrected my own mistake here.

And what you are saying is most of those that have gone to competitive bidding they have replaced a situation what, where there was just individual appointment by judges of lawyers?

Mr. SPANGENBERG. Exactly. There is one major competitive bidding county, San Diego County, which as you know is one of the 50 largest counties—maybe one of the 10 largest counties—in the country. They went through 6 years, the county commissioners went through 6 years of competitive bidding, and there were several studies that the county commissioners had done.

Mr. FRANK. Supervisors.

Mr. SPANGENBERG. Supervisors. County supervisors had done. And they ultimately determined that that system simply did not work for San Diego County and ultimately established a large public defender program in San Diego County.

Mr. FRANK. That is in your testimony?

Mr. SPANGENBERG. Pardon me?

Mr. FRANK. Is that example in your testimony?

Mr. SPANGENBERG. It is.

Mr. FRANK. All right. I think that is very helpful. I appreciate that.

Mr. Washington.

Mr. WASHINGTON. I have no questions, Mr. Chairman.

Mr. FRANK. Thank you. This is very useful. We will be back to you, but I think these things are very helpful.

Mr. Ross, I assume you and Mr. Douglas will discuss this at some greater length?

Mr. ROSS. Yes, I think so.

Mr. SPANGENBERG. Thank you, Mr. Chairman.

Mr. ROSS. Thank you.

Mr. FRANK. Thank you. The hearing is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

LEGAL SERVICES CORPORATION REAUTHORIZATION

WEDNESDAY, MAY 23, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Harley O. Staggers, Jr., Don Edwards, Craig A. Washington, Craig T. James, Lamar S. Smith, and Tom Campbell.

Also present: Representative Howard L. Berman.

Staff present: Janet S. Potts, chief counsel; Belle Cummins, assistant counsel; Cynthia Blackson, chief clerk; and Roger T. Fleming, minority counsel.

Mr. FRANK. The meeting of the Subcommittee on Administrative Law and Governmental Relations is now in order.

This is the second in a series of hearings we're having on the reauthorization of the Legal Services Corporation, and we are grateful of the cooperation we have received.

Mr. James, do you have an opening statement?

Mr. JAMES. I'm looking forward to hearing the testimony and let's get on with the hearing and I think that will suit everybody.

Mr. FRANK. Thank you. I know many of us are delighted to welcome back one of our most distinguished former colleagues, John Erlenborn. I must say that many of us felt when he was appointed to serve on a position on the Board, and agreed to do that—for which we're very grateful, since it's not exactly historically the most fun in the world—that helped to create a climate in which I think a lot of people feel that we are going to be able to reduce some of the acrimony that has existed in the past, and work together.

Many of us welcome John Erlenborn's appointment and we're delighted to have John testify before us now on behalf of the Corporation. Please come forward, John.

STATEMENT OF JOHN N. ERLENBORN, VICE CHAIRMAN, BOARD OF DIRECTORS, LEGAL SERVICES CORPORATION

Mr. ERLENBORN. Thank you very much, Mr. Chairman, and members of the committee.

Mr. Chairman, I thank you for your introduction. Let me say that when you made the observation about the fun about serving on the Board, I thought you were the master of understatement.

Mr. FRANK. I will cherish that comment. It's probably the only time I've gotten it so I'm going to make sure the recorder got that one down. Thank you.

Mr. ERLENBORN. Mr. Chairman, as you know, I am John Erlenborn. I am the Vice Chairman of the Board of Directors of Legal Services Corporation.

Our Board Chairman, George Wittgraf of Cherokee, IA, has asked me to apologize to you for his inability to be with you here today. A prior obligation in his law practice requires his presence in northwest Iowa. Mr. Wittgraf has asked me, however, to share with you his prepared statement.

Mr. Wittgraf's statement was reviewed, on an individual basis, by the members of our Board of Directors this past Monday. While our Board did not act formally upon this statement, it does, I believe, reflect fairly the thoughts of our Board members at this time.

Mr. Chairman, now I would like to read Mr. Wittgraf's statement—it's short.

"Mr. Chairman, and members of the House Judicial Subcommittee on Administrative Law and Governmental Relations, my name is George Wittgraf"—I'm speaking for George, of course.

"A practicing attorney in Cherokee, IA, I became a member of the Board of Directors of the Legal Services Corporation, as a recess appointee, this past January. In turn, I was elected Chairman of the Board on February 12, 1990.

"In fact, all of the present members of the Board of Directors are recess appointees. We anticipate that we will be nominated as Directors by the President in the relatively near future. In the meantime, we are doing our best to move the Legal Services Corporation into the 1990's as positively as possible.

"As new Directors, we necessarily at the beginning of our learning curve. To date, we have met on February 12, March 26 and 27, April 30, and May 21, 1990—somewhat more frequently than the present law mandates.

"We have attempted both to educate ourselves as to the Corporation's activities and to assure those who are involved with or affected by the Corporation's activities that we come to our task with open minds. We also have been devoting our time and energy to the selection of a new President for the Corporation.

"Whatever our early activities, be assured that we as a Board share your belief that all Americans need equal access to our civil justice system; that the need for high quality legal assistance follows from that; and that justice for low-income Americans will be served through the provision of such legal assistance.

"Keeping in mind the old nostrum that 'a little knowledge can be a dangerous thing,' we have not sided yet with any of the oft mentioned 'reform' proposals. Our Board members do see the need for certain reforms to reduce or eliminate continuing abuses or excesses of one kind or another. But we have opted to date to leave the reform debate to the principals.

"In fact, we are encouraged by, and we wholeheartedly support, the good-faith compromise discussions and negotiations which are

under way among the principals. We also are heartened by the fact that that all of the active participants in the reform and reauthorization debates have acknowledged their support for the provision of civil legal services through Federal funding.

"We stand ready, of course, to implement any 'reforms' that the Congress and the White House agree upon this year, be they part of a reauthorization bill or an appropriations bill.

"Our greatest concern, however, is with the future of the Legal Services Corporation and the services provided through it. We recognize, as we know you do, that the challenges and needs now facing the Legal Services Corporation, and legal services staff attorneys, are far different from those of the 1960's and 1970's.

"It is our hope, then, that through cajoling, experimental funding, and otherwise, we can find more effective and more efficient ways to meet those challenges and needs.

"Furthermore, we realize that full Federal funding for civil legal services never will be possible. So we also plan to do whatever we can to stimulate increases in both non-Federal funding sources and in the provision of pro bono services.

"Our Board does not view itself as merely an advocate for the Corporation's grantees. We realize that we and the grantees necessarily play different roles in the provision of federally funded legal services. We accept the fact that these different roles necessarily will generate tensions in our working relationship—tensions which we believe can be healthy rather than harmful.

"We plan to work with the grantees, just as we plan to work with the administration, the Congress, the organized bar, an the client community in providing civil legal services to low-income Americans. In fact, we believe that our relationship with the grantees and their representatives during these past few months underscores our commitment to such a constructive partnership.

"We sincerely look forward to the completion of the reauthorization process, be it this year or next. We want the law to be clear as it pertains to our rights and responsibilities as a Board of Directors.

"We believe that everyone in the legal services arena will be relieved by, and will benefit from, a clear statement of the law. Be assured that we will make every effort to comply openly, equitably and positively with that law.

"I trust that"—and I'm still speaking for George Wittgraf at this point—"I trust that your former colleague, John Erlenborn, the Vice Chairman of the Board of Directors, who is before you today, and who has brought this statement to you, will share some of his own thoughts regarding the future of the Legal Services Corporation with you.

"Let me close by saying simply that our Board of Directors and I stand ready to cooperate with you in any way that we can as you had head down the road to Legal Services Corporation. Please do not hesitate to inquire of us, and of our staff, at any time.

"Thank you for your attention to my remarks and especially for your commitment to the difficult task at hand."

Mr. Chairman, I have interlineated some comments and skipped over others, but I would hope that the whole of Mr. Wittgraf's statement can be placed in the record.

Mr. FRANK. If there's no objection, and there does not appear to be, it will be placed in the record. Thank you.

Mr. ERLENBORN. Thank you, Mr. Chairman.

Mr. FRANK. Thank you very much, Mr. Erlenborn.

[The prepared statement of Mr. Wittgraf follows:]

INTRODUCTORY STATEMENT

OF

JOHN N. ERLENBORN
VICE CHAIRMAN, BOARD OF DIRECTORS

LEGAL SERVICES CORPORATION

Good morning, Mr. Chairman, and members of the House Judiciary Subcommittee on Administrative Law and Governmental Relations. I am John N. Erlenborn, Vice Chairman of the Board of Directors of the Legal Services Corporation.

Our Board Chairman, George W. Wittgraf of Cherokee, Iowa, has asked me to apologize to you for his inability to be with you today. A prior obligation in his law practice requires his presence in northwest Iowa. Mr. Wittgraf has asked me, however, to share with you his prepared statement.

Mr. Wittgraf's statement was reviewed, on an individual basis, by the members of our Board of Directors this past Monday, May 21, 1990. While our Board did not act formally upon this statement, it does, I believe, reflect fairly the thoughts of our Board members at this time.

PREPARED STATEMENT

OF

GEORGE W. WITTGRAF
CHAIRMAN, BOARD OF DIRECTORS

LEGAL SERVICES CORPORATION

Mr. Chairman, and members of the House Judicial Subcommittee on Administrative Law and Governmental Relations, my name is George W. Wittgraf. A practicing attorney in Cherokee, Iowa, I became a member of the Board of Directors of the Legal Services Corporation, as a recess appointee, this past January. In turn, I was elected Chairman of the Board on February 12, 1990.

In fact, all of the present members of the Board of Directors are recess appointees. We anticipate that we will be nominated as Directors by the President in the relatively near future. In the meantime, we are doing our best to move the Legal Services Corporation into the 1990's as positively as possible.

As new Directors, we necessarily are at the beginning of our learning curve. To date, we have met on February 12, March 26 and 27, April 30, and May 21, 1990 -- somewhat more frequently than the present law mandates. We have attempted both to educate ourselves as to the Corporation's activities and to assure those who are involved

with or affected by the Corporation's activities that we come to our task with open minds. We also have been devoting our time and energy to the selection of a new President for the Corporation.

Whatever our early activities, be assured that we as a Board share your belief that all Americans need equal access to our civil justice system; that the need for high quality legal assistance follows from that; and that justice for low income Americans will be served through the provision of such legal assistance.

Keeping in mind the old nostrum that "a little knowledge can be a dangerous thing," we have not sided yet with any of the oft mentioned "reform" proposals. Our Board members do see the need for certain reforms to reduce or eliminate continuing abuses or excesses of one kind of another. But we have opted to date to leave the reform debate to the principals.

In fact, we are encouraged by, and we wholeheartedly support, the good-faith compromise discussions and negotiations which are underway among the principals. We also are heartened by the fact that all of the active participants in the reform and reauthorization debates have acknowledged their support for the provision of civil legal services through federal funding.

We stand ready, of course, to implement any "reforms" that the Congress and the White House agree upon this year, be they part of a reauthorization bill or an appropriations bill.

Our greatest concern, however, is with the future of the Legal Services Corporation and the services provided through it. We recognize, as we know you do, that the challenges and needs now facing the Legal Services Corporation, and legal services staff attorneys, are far different from those of the 1960's and 1970's. It is our hope, then, that through cajoling, experimental funding, and otherwise, we can find more effective and more efficient ways to meet those challenges and needs. Furthermore, we realize that full federal funding for civil legal services never will be possible. So we also plan to do whatever we can to stimulate increases in both non-federal funding sources and in the provision of pro bono services.

Our Board does not view itself as merely an advocate for the Corporation's grantees. We realize that we and the grantees necessarily play different roles in the provision of federally-funded legal services. We accept the fact that these different roles necessarily will generate tensions in our working relationship -- tensions which we believe can be healthy rather than harmful. We plan to work with the grantees, just as we plan to work with the

Administration, the Congress, the organized bar, and the client community in providing civil legal services to low income Americans. In fact, we believe that our relationship with the grantees and their representatives during these past few months underscores our commitment to such a constructive partnership.

We sincerely look forward to the completion of the reauthorization process, be it this year or next. We want the law to be clear as it pertains to our rights and responsibilities as a Board of Directors. We believe that everyone in the legal services arena will be relieved by, and will benefit from, a clear statement of the law. Be assured that we will make every effort to comply openly, equitably and positively with that law.

I trust that your former colleague, John N. Erlenborn, the Vice Chairman of our Board of Directors, who is before you today, and who has brought this statement to you, will share some of his own thoughts regarding the future of the Legal Services Corporation with you.

Let me close by saying simply that our Board of Directors, and I, stand ready to cooperate with you in any way that we can as you head down the road to reauthorization. Please do not hesitate to inquire of us, and of our staff, at any time.

Thank you for your attention to my remarks and, especially, for your commitment to the difficult task at

4.

Mr. FRANK. I'm not going to take a lot of time for questioning now, only because I think we will have a lot of time to talk about these things informally. I think the statement is an appropriate beginning.

As you said, there's a dual role there: It is the role of the Board, obviously, to see that the law is applied as it is presented; and there's also a question about what the law ought to be. I appreciate the way you're dealing with this.

I do want to mention one issue—and I'm not going to get into any great deal—but I know there was pending before the Board questions about some actions taken by the California Rural Legal Assistance, and they're going to be testifying later. We will not get into the details of that.

I have spoken with my colleague, Mr. Campbell from California, who has some familiarity with California law; and I believe based on those conversations he's going to be in touch with the Board members to speak on behalf of both of us about that, and we're hoping that that's something that can be resolved. I just pass that along but I don't think there's any point in going into any details on this.

I have no questions.

Mr. James.

Mr. JAMES. We are all delighted to have new appointees—give a new perspective; and from what I understand, your qualifications are certainly superb for this job.

I have a letter in my hand written by Jack Kemp, bringing forth an issue of there being, perhaps, cross-purposes in HUD. Have you seen that letter?

Mr. ERLENBORN. I have. That was delivered to us at our Board meeting on Monday of this week. I think that's the same letter.

Mr. JAMES. Apparently he's concerned about being able to evict drug dealers from housing authorities and Legal Services apparently is representing people who obviously qualify as indigents for legal services in the eviction process, which is civil in nature; and not to be confused with criminal defense, of course.

Do you have a reaction to how or when the Board might address that problem, if at all?

Mr. ERLENBORN. That was the subject of Board discussion and action on Monday at our Board meeting. A resolution was added to the agenda and was offered by one of the Board members. It was redrafted in a friendly negotiation to avoid any problem with the Government in the Sunshine Act and the failure to give proper notice that this matter would be considered by the Board.

The action finally taken was the adoption of a resolution instructing the Corporation staff to study this matter and come back with recommendations to the Board for whatever action we might be able to take through regulation, and so forth, under existing law, to try to meet the concerns of Secretary Kemp.

Mr. JAMES. I suppose the two sides of the argument could be that they're obviously guilty and that it's a bit of a problem; but how do you make the predetermination as to whether or not there's appropriate representation? A thorny issue.

Mr. ERLENBORN. I think there are many issues here that properly should be given attention, is one disqualified from being repre-

sented by Legal Services attorneys merely because they've been accused; or are others who are not even accused but happen to be residents in the household also to be disqualified; many issues that have to be addressed before this could be properly resolved.

Mr. JAMES. Yes.

Thank you very much for your testimony.

Thank you, Mr. Chairman.

Mr. FRANK. Thank you, John, it's a pleasure to know that we've got a Board now that's going to be able to deal with these issues the way the Board's supposed to—but we don't have to get into all the details—I appreciate it.

Let me say that the lack of questioning recognizes the fact that we've got a relatively new Board and at this point we're not interested in preliminaries but some serious conversation. It would probably be appropriate later on for us maybe to meet with members of the Board, and I think we might even ask for an informal meeting with members of the subcommittee, members of the Board, or if you want to come back and testify.

I just want to make it clear—we recognize it's a new Board that's dealing with these issues and it's a little early in the process to get into any great detail with you.

Mr. ERLENBORN. I think I can speak for the Board in saying that we would welcome such an informal meeting.

Mr. FRANK. Thank you, we look forward to that.

Mr. JAMES. Mr. Chairman, could I make a unanimous consent request to submit for the record a statement by Congressman French Slaughter regarding today's proceedings?

Mr. FRANK. Yes, without objection. As the minority member had intervened, Mr. Slaughter had a witness he wanted to present and we were glad to do that; apparently the witness decided they would rather do it by written statement, and we're glad to have that in the record.

[The prepared statement of Mr. Slaughter follows:]

STATEMENT BY THE HONORABLE D. FRENCH SLAUGHTER, JR. FOR HEARINGS ON LEGAL SERVICES CORPORATION IN THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENT RELATIONS

WEDNESDAY, MAY 23, 1990

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I APPRECIATE THE OPPORTUNITY TO MAKE A BRIEF STATEMENT TO THE SUBCOMMITTEE CONCERNING THE LEGAL SERVICES CORPORATION.

FIRST, LET ME BRIEFLY TELL YOU A FEW THINGS ABOUT THE 7TH CONGRESSIONAL DISTRICT OF VIRGINIA. THE 7TH DISTRICT PRODUCES TWO-THIRDS OF THE FRUIT IN VIRGINIA, WHICH RANKS 7TH NATIONALY IN FRUIT PRODUCTION.

SEVERAL OF THE GROWERS IN 7TH DISTRICT COMMUNICATE WITH MY STAFF AND ME ON A REGULAR BASIS REGARDING ISSUES WHICH EFFECT THEIR LIVELIHOODS. ONE OF THE GROWERS' MOST SERIOUS CONCERNS IS WITH THE LEGAL SERVICES CORPORATION, WHICH CAUSES THEM A TREMENDOUS BURDEN IN LEGAL COSTS FOR ALLEGED VIOLATIONS, WHICH IF INDEED THEY ARE VIOLATIONS, SEEM TO BE DE MINIMUS AT BEST.

FRUIT PRODUCTION NATURALLY REQUIRES INTENSIVE LABOR, AND MANY OF THE GROWERS IN THE 7TH DISTRICT DEPEND ON FOREIGN LABOR, WHICH THEY OBTAIN THROUGH THE H-2A WORKER PROGRAM AFTER EXHAUSTING THEIR EFFORTS TO RECRUIT DOMESTIC WORKERS. MANY GROWERS IN THE 7TH DISTRICT BELIEVE THAT LEGAL SERVICES

tions exposed to extremely toxic pesticides and deprived of access to the most elementary of human needs, toilets.

And agricultural employers refuse to let American farmworkers know about job opportunities, preferring instead to import more exploitable foreign guest workers.

All of the above represent clear-cut violations of law. Year in and year out, the abuses recur.

Yet, instead of punishing the Migrant Legal Services Programs have been subjected to unrelenting, withering attack. We have witnessed the spectacle of LSC Board members encouraging growers to file complaints about Migrant Legal Services Programs.

In one of the most "courtesy calls" I've ever experienced as a member being visited by a new official, LSC President Terry Wear stated that one of his goals is undermine the migrant programs.

And only a few months ago, a member of my staff attended an address by LSC official James Wilken to the National Council of Agricultural Employers, at which Wilken said of the McCollum-Stenholm proposal:

"Concerning the provision which would require them to exhaust their administrative remedies . . . this will slow them up so that at least you won't be facing private suits. Also, by forcing them to go all the way through the administrative process—with that time and expense—it will help you generate your best case for legislative relief. Your problems here are not just with the LSC. You also have problems with the statutes, like the Migrant and Seasonal Agricultural Workers Protection Act. But you can get significant relief by changing the LSC."

Certainly we must all wonder what the migrant programs have done to merit this extraordinary attack. I must tell you that what they have done is win cases and enforce the law. I would like to submit for the record a list of the reported decisions in AWPA—Agricultural Worker Protection Act cases—brought by Migrant Legal Services Programs. Of the 28 reported cases, 25 were successful, one resulted in a finding of grower liability but no award of damages, and only three were unsuccessful—but even there, the adverse decision in one of those three cases was overruled this past spring in a Migrant Legal Services case in which the farmworker prevailed in a 9 to 1 decision of the U.S. Supreme Court.

Nine-five of the cases brought by migrant programs result in favorable results for farmworker clients. Even when settlements are considered, 90 percent of the cases ever reach a judgments for farmworkers. There has not been a single case in which statutory damages have been refused because the court found there was a failure by the Legal Services attorney to negotiate, even though AWPA permits such scrutiny by the court.

To state the obvious, so long as they are not caught at it, it is cheaper for agricultural employers to violate the law. And that is why some growers do so. We should not wonder that they are not pleased when, thanks to the effective legal representation provided by migrant programs, they are compelled to comply with the law.

The great mystery to me is why unscrupulous agricultural employers go to such great expense, once they have been caught in the act, to avoid compliance with farmworker protective laws. Certainly the unrelenting attack on the migrant programs gives aid

and comfort to those who are convinced that the cost of complying with laws passed by Congress is too high.

Let me close, Mr. Chairman, by citing just one of the many successful Migrant Legal Services cases, and asking the subcommittee whether this is the type of situation we can in good conscience allow to go unredressed:

In *Bertrand* v. *Jorden,* a Federal court in Florida found that migrant farmworkers had been beaten when they questioned and refused to work because of low piece wage rates. After contacting a Legal Services office, they were threatened with being beaten to death. Though the lives of these farmworkers were in jeopardy, neither the U.S. Department of Labor nor local officials were anywhere to be found. In fact, the crew leader had a long history and was known to DOL for violations of the law.

DOL had indeed found the crew leader in violation on several occasions, but the court noted that DOL's enforcement actions "had little impact on the crew leader's business practices."

These farmworkers were saved because there was a Migrant Legal Services Program in North Carolina to which they could turn.

There was a time when our energies and those of the Legal Services Corporation were engaged in creative efforts to more effectively serve the migrant farmworker population, in light of their extraordinary unmet legal needs and the special difficulties they face in gaining access to legal assistance.

With the help of this subcommittee, it is my hope that we can restore the proper focus of our attention: Equal justice for migrant farmworkers who, but for Migrant Legal Services Programs, would have no justice at all.

I would appreciate it if the subcommittee would allow me to include the summary of the reported decisions brought by Migrant Legal Services Programs.

Mr. FRANK. Without objection, it will be included.

[The prepared statement of Mr. Berman, and reported decisions in AWPA cases follow:]

STATEMENT OF HON. HOWARD L. BERMAN

OVERSIGHT HEARING ON THE LEGAL SERVICES CORPORATION

SUBCOMITTEE ON ADMINISTRATIVE LAW AND INTERGOVERNMENTAL RELATIONS

MAY 23, 1990

Mr. Chairman: I am delighted to appear before you today, to provide the subcommittee with some hard facts regarding the work of migrant legal services programs, and to offer my own views regarding the exemplary work they perform on behalf of this nation's migrant farmworkers.

In my estimation, migrant legal services staff are the unsung heroes of the American bar, and I am happy to have this opportunity to say so. But for their hard-won expertise in migrant law, and their willingness to work long hours at low pay, I am convinced that migrant farmworkers would be without any recourse for the vindication of critical rights.

I have worked closely with many migrant legal services staff people, and I can tell you that they are among the most decent and humane people I have ever known. These are people who should need no defense from me, but unfortunately that seems not to be the case. And so, instead of appearing before you to plead for how much more remains to be done on behalf of this nation's farmworkers, I find myself instead defending the few resources we have put at their disposal.

The migrant programs and their staffs labor under the most difficult of circumstances. It is not easy providing effective legal representation to clients who by definition are here today, but gone to the next crop tomorrow. It is not easy fulfilling the

responsibility of all legal services programs to conduct effective outreach to inform the client community of the availability of legal services, when in so many instances, the client community lives in camps on the property of their employers.

Yet migrant farmworkers suffer the most desperate of legal problems. Their wages are the lowest of any of America's workers, yet even at that, they are shorted on their wages by unscrupulous employers and crew leaders. Whole families are put on a single pay stub in an effort by agricultural employers to create a record appearing to show compliance with minimum wage. FICA is withheld from paychecks but never paid in, with the result that a generation of farmworkers may well go without the social security benefits they have earned. Workers are recruited for jobs with wage offers that fail to materialize. They are transported by crew leaders in vehicles that would fail to meet any known standards. Migrant workers, including children and pregnant women, work under the most unhealthy of conditions, exposed to extremely toxic pesticides and deprived of access to the most elemental of human needs, toilets. And agricultural employers refuse to let American farmworkers know about job opportunities, preferring instead to import more exploitable foreign guestworkers.

All of the above represent clearcut violations of law. Year in and year out, the abuses recur.

Yet instead of plaudits, the migrant legal services programs have been subjected to unrelenting, withering attack. We have witnessed the spectacle of LSC board members encouraging growers to file complaints about migrant legal services programs. In one of

the oddest "courtesy calls" I have ever experienced as a Member being visited by a new official, LSC president Terry Wear shared with me his plan to undermine the migrant programs.

And only a few months ago, a member of my staff attended an address by LSC official James Wooten to the National Council of Agricultural Employers, at which Wooten said of the McCollum-Stenholm proposal:

"Concerning the provision which would require them to exhaust their administrative remedies...this will slow them up so that at least you won't be facing parallel suits. Also, by forcing them to go all the way through the administrative process--with that time and expense--it will help you generate your best case for legislative relief. Your problems here are not just with the LSC. You also have problems with the statutes, like the Migrant and Seasonal Agricultural Workers Protection Act. But you can get significant relief by changing the LSC."

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95% of cases brought by migrant programs result in favorable results for farmworker clients. Even when settlements are eliminated, 90% of cases tried result in judgments for farmworkers. There has not been a single case in which statutory damages have been reduced because the court found there was a failure by the legal services attorney to negotiate, even though AWPA permits such scrutiny by the court.

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The great mystery to me is why unscrupulous agricultural employers go to such great expense, once they have been caught in the act, to avoid compliance with farmworker protective laws. Certainly the unremitting attack on the migrant programs gives aid and comfort to those who are convinced that the cost of complying with laws passed by Congress is too high.

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There was a time when our energies and those of the Legal Services Corporation were engaged in creative efforts to more effectively serve the migrant farmworker population, in light of their extraordinary unmet legal needs and the special difficulties they face in gaining access to legal assistance. With the help of this Subcommittee, it is my hope that we can restore the proper focus of our attention: equal justice for migrant farmworkers who, but for migrant legal services programs, would have no justice at all.

Reported Decisions in AWPA Cases Brought by Migrant Legal Services Programs

Successful litigation

Adams Fruit Co. v. Barrett, __ U.S. __ (March 21, 1990).
Prior decision: 867 F.2d 1305 (11th Cir. 1989)

Avalos v. La Conca D'Oro, Inc., 111 Lab. Cas. (CCH) ¶ 35,188 (E.D.Pa. 1988).
Prior decision: 111 Lab. Cas. (CCH) ¶ 35,187 (E.D.Pa. 1987).

Bernett v. Hepburn Orchards, 106 Lab. Cas. (CCH) ¶ 34,913 (D.Md. 1987).

Bohan v. Hudson, 28 Wage & Hour Cas. (BNA) 357 (E.D.N.C. 1987).
Prior decision: 115 F.R.D. 193 (E.D.N.C. 1987).

Bracamontes v. Weyerhaeuser Co., 840 F.2d 271 (5th Cir. 1988), cert. denied, __ U.S.__(1988).

Bresgal v. Brock, 833 F.2d 763 (9th Cir. 1987) amended 843 F.2d 1163 (9th Cir. 1988).
Prior decisions: 637 F. Supp. 271 (D.Or. 1985);637 F. Supp. 278 (D.Or. 1985); 637 F. Supp. 280 (D.Or. 1986).

Bueno v. Mattner, 633 F. Supp. 1446 (W.D. Mich. 1986), aff'd 829 F.2d 1380 (6th Cir. 1987), cert. denied, 108 S. Ct. 1994 (1988).

Caugills v. Hepburn Orchards, Inc., 108 Lab. Cas. (CCH) ¶ 35,042 (D.Md. 1987).

Clarke v. Gardenhour Orchards, Inc., 108 Lab. Cas. (CCH) ¶ 35,070 (D.Md. 1987).

Colon v. Casco, Inc., 716 F. Supp. 688 (D.Mass. 1989).
Prior decision: 111 Lab. Cas. (CCH) ¶ 35,190 (D.Mass. 1988).

Colunga v. Young, 722 F.Supp. 1479 (W.D.Mich. 1989).

Coronado v. Selkirk, 113 Lab.Cas. (CCH) ¶ 35,283 (W.D.Mich. June 23, 1989).

Cox v. Bissette, 109 Lab. Cas. (CCH) ¶ 35,097 (E.D.N.C. 1988).

Fields v. Luther, 108 Lab. Cas. (CCH) ¶ 35,072 (D. Md. 1988).

Frenel v. Freezeland Orchard Co., 108 Lab. Cas. (CCH) ¶ 35,016 (E.D.Va. 1987).

Haywood v. Barnes, 109 F.R.D. 568 (E.D.N.C. 1986).
Prior decision: 101 Lab. Cas. (CCH) ¶ 34,561 (E.D.N.C. 1984).

Howard v. Malcolm, 852 F.2d 101 (4th Cir. 1988).
Prior decisions:629 F. Supp. 952 (E.D.N.C. 1986);658 F. Supp. 423 (E.D.N.C. 1987).

Maldonado v. Lucca, 636 F. Supp. 621 (D.N.J. 1986). Prior decision: 629 F. Supp. 483 (D.N.J. 1986).

Martinez v. Berlekamp Farms, Inc., 635 F. Supp. 1191 (N.D.Ohio 1986).

Monville v. Williams, 107 Lab. Cas. (CCH) ¶ 34,979 (D. Md. 1987).

Osias v. Marc, 700 F.Supp. 842 (D. Md. 1988).

In re Reyes, 814 F.2d 168 (5th Cir. 1987), cert. denied 108 S.Ct. 2901.

Rodriguez v. Berrybrook Farms, Inc., 672 F.Supp. 1009 (W.D.Mich. 1987).

Rodriguez v. Jackson, 110 Lab. Cas. (CCH) ¶ 35,137 (D. Ariz. Nov. 9, 1987).

Simmons v. Middleton, 107 Lab. Cas. (CCH) ¶ 35,000 (M.D. Fla. 1987).

Litigation where liability was found but no damages were awarded under the AWPA

Frederick County Fruit Growers Ass'n v. Dole, 709 F. Supp. 242 (D.D.C. 1989).

Unsuccessful litigation

Gonzales v. Puente, 705 F. Supp. 331 (W.D.Tex. 1988).

Mendoza v. Wight Vineyard Management, 579 F. Supp. 268 (N.D. Cal. 1984), aff'd as amended on denial of reh'g, 783 F.2d 941 (9th Cir. 1986).

Roman v. Sunny Slope Farms, 817 F.2d 1116 (4th Cir. 1987), cert. denied, 108 S. Ct. 163 (1988).[1]

[1]The adverse decision in Roman was overruled by the U.S. Supreme Court in Adams Fruit Co., Inc. v. Barrett, ___U.S.___ slip op. at p. 2, (March 21, 1990).

Mr. BERMAN. I might just add informally and in conclusion, that I did hear the chairman mention the situation with the California Rural Legal Services Program. Apart from the issue in that case, which the chairman and others on the subcommittee are pursuing, I think it's wrong that a corporation that wants to, can reduce 9.95 percent of a program's funds without going through any element of due process. I would hope that we might look at ways in which—perhaps not the same level of due process in terms of hearings and cross-examination, but some level of due process might be allowed in reviewing those kinds of cuts; because those kinds of 9.95% cuts year after year if not justified based on some evidentiary standard and with some due process involved—can destroy a program in a fashion that I don't think we in Congress ever contemplated.

Thank you, Mr. Chairman.

Mr. FRANK. I thank the gentleman.

Let me say, that is one of the subjects we will pursue—not just the substance of this particular one, but I believe the new Board does intend to look at the procedures that would be followed in these cases.

I have no particular questions because I know Mr. Berman, as a member of the full committee, will be very much involved as we legislate here—I just want to thank him for testifying and to note that this is a frequent subject with him. The migrant agricultural workers are not the best represented people in the world. They don't have the highest voting participation. My guess is a disproportionately small number of migrant workers are members of the League of Women Voters are politically active.

So for a Member of Congress, particularly one from a pretty urbanized district, to be as active as he has been on their behalf, is an admirable thing. It's not an issue which brings a lot of credit or a lot of plaudits, and Mr. Berman has been a yeoman defender of the rights of people who—without referring to the merits of this particular case—aren't always fully represented. So I want to acknowledge the work he has done as he has done in previous efforts that the committee has dealt with with agricultural workers.

Mr. James.

Mr. JAMES. One of the problems that's giving me some difficulty—and maybe it's because I hadn't researched it or haven't been able to find the proper answers—what's the definition of a migratory worker? Is it defined by the job they do, or is it defined by the fact that they are from another country?

In other words, if I had a man do my yard work let's say, who was employed by a contractor that took care of my yard, and he hires a person that has citizenship in another country and who only spends 6 months in Florida. Is that person considered a migratory worker?

Mr. BERMAN. The issue of who is a migrant farmworker, which I think is your question, has nothing to do with where the individual comes from. There are many migrant farmworkers who are U.S. citizens or permanent resident aliens of the country.

Mr. JAMES. OK, I'll give you another example then.

Mr. BERMAN. The test really is your definition of "agriculture." There are definitions of agriculture in the Fair Labor Standards Act and other laws. And the person who works for an agricultural

employer and migrant employers going from farm to farm and crop to crop——

Mr. JAMES. Let's try this one. Obviously it would be migratory if you picked cherries in one State and go down and pick oranges in Florida, that's the classic definition of what I've thought of as a migratory worker.

But what if your farm product is year-round, and you don't care whether it's domestic people or whoever applies that works 12 months a year and works for as long as they want to, would they then be a migratory worker if the job is available for 12 months a year?

Mr. BERMAN. If it's a year-round job in agriculture, does the individual have a permanent position with a specific employer?

Mr. JAMES. Is it defined by permanency of position or nature of the job that's being chosen?

Mr. BERMAN. I define it as the nature of the job.

Mr. JAMES. It's piecework, available year-round. Say they're paid by the piece but they could work 6 to 8 hours a day, year-round, would they then qualify as a migrant worker, if their job is there? Do you follow what I'm saying?

Mr. BERMAN. Yes, I do. Your answer is in the context of the Migrant Legal Services Program so let me just take 1 second and turn back here and ask those who would know the answer to that.

My assumption is that the Migrant Legal Services Program is designed to represent workers who do not work year-round for a specific employer; that is, just agricultural; am I right about that?

Mr. SAUCEDO. You are generally right about that.

Mr. JAMES. The reason I asked is, there are some farmers who's work is available year-round, but they are faced with suits. This is the Migratory Act as opposed to any other act that would cover the activity; do you follow what I'm saying? Where do you draw the line?

Mr. BERMAN. My sense is we're talking here about farmworkers, the vast majority of which do not work year-round, for one.

Mr. JAMES. I was thinking, quite frankly, of one specific industry which is faced with Legal Services lawsuits who is trying to apply for work that's available year-round—true, it's piecework.

Mr. BERMAN. But is it agriculture work?

Mr. JAMES. Yes, it is—agriculture.

Mr. BERMAN. I think that's consistent with their mandate, to——

Mr. JAMES. I have some difficulty with that because I think the migratory workers law was essential and necessary in this first instance because of the transitory nature of the work. The abuses that occurred in the migratory field when a person did not have a base of operation year-round, or did not have that available to them.

Really I was asking you for information purposes.

Mr. BERMAN. I think you're going to hear from witnesses who will be able to speak with more expertise to that subject. And I do agree with the gentleman that the greatest pattern and most flagrant abuses occur in those positions which are seasonal in nature and where the individual is——

Mr. JAMES. Where we had the labor camp backdrop and the company store type of thing.

Mr. BERMAN. That's right.

Mr. JAMES. That, of course, is the classic example. But then we've had variations of that in the agricultural area and I've never been too sure when it applies and when it doesn't. I don't think there's a clear-cut definition, or maybe there is, in that scenario.

Thank you very much for your testimony. I appreciate your effort and your concern.

Mr. EDWARDS [presiding]. Mr. Smith.

Mr. SMITH of Texas. I don't have any questions, Mr. Chairman, thank you.

Mr. EDWARDS. Mr. Campbell.

Mr. CAMPBELL. No questions, thank you.

Mr. EDWARDS. Mr. Washington.

Mr. WASHINGTON. No questions.

Mr. EDWARDS. I echo the chairman's words that you are doing a yeoman's job; we are all very pleased.

Mr. BERMAN. Thank you.

Mr. EDWARDS. Our next witness is Mr. F. William McCalpin, who is president of the National Legal Aid and Defender Association. We welcome you.

Without objection, your full statement will be made a part of the record and you may proceed.

STATEMENT OF F. WM. McCALPIN, PRESIDENT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. MCCALPIN. Thank you, Mr. Edwards, members of the committee.

I gather that a qualification for appearing here today is to have been a former something; happily, I satisfy that qualification.

My name is F. William McCalpin. I am a lawyer in private practice in St. Louis, MO, and I appear before you today as the incumbent president of the National Legal Aid and Defender Association.

It has been my privilege on prior occasions to have appeared before the subcommittee which previously had responsibility for this important endeavor, Mr. Kastenmeier's committee, sometimes representing the American Bar Association and on other occasions in my capacity as the then Chairman of the Board of the Legal Services Corporation.

My principal purpose today is to urge you to consider several proposals to amend the Legal Services Corporation Act which have been developed by NLADA, by our companion organization, the Project Advisory Group, and other individuals and entities who are engaged from day to day in delivering legal services to the indigents of this country.

It has been so long since we have all felt that reauthorization legislation would be productive that I think it may not be inappropriate to pause for a moment to reflect what it is that brings us here today.

For me, the answer was reaffirmed a couple of weeks ago as I stood before that magnificent Supreme Court building across the way and once again read that legend emblazoned on the facade: "Equal justice under law." That's what we're about today—renewing, reinvigorating our efforts to permit indigents, poor people, to

stand equal before the law; to make the law work for them, as it does for others who may be more affluent, more powerful.

We have lived for 15 years under the Legal Services Corporation Act, the 1977 amendments, and the various riders which have accompanied appropriations bills in various years.

I suggest that it is past time to consolidate that unwieldy statutory structure and to move forward.

It has been our pleasure to work with the new Board. As Mr. Erlenborn said earlier, we have had the opportunity to consult and confer with them. Others have sat down with representatives proposing various modifications to the act, and we are seriously engaged in an effort to try to reach some accommodation on the issues which have divided us so long.

There is, as you know, a package of reform proposals, which have generally become known as the McCollum-Stenholm proposals. I bring to you today a separate, distinct set of proposals, which have been worked out by the groups whom I am representing here today. Some of them propose alternatives to McCollum-Stenholm proposals; others of them are entirely separate.

You heard some responses to the McCollum-Stenholm proposals when you gathered here 2 weeks ago from Representative Cardin, Jack Curtin, the president-elect of the ABA, and others. I endorse what they said. I may elaborate slightly on what they said as I present our proposals.

They fall, as my remarks indicate, generally into four areas. The first deals with the composition, jurisdiction, rights, and responsibilities of local boards administering legal aid programs around the United States —more than 300 of them today. Our premise is that they are in the best position to make basic decisions about how and what legal services are provided to indigents in their service area.

I have, Mr. Chairman, an outline of those proposals, which I would like to submit for the record as an attachment to my report, which has been presented to you.

Mr. FRANK. Without objection, that will be made part of the record.

[The proposals follow:]

NLADA/PAG

AFFIRMATIVE PROPOSALS
(May 15, 1990)

The National Legal Aid and Defender Association and the Project Advisory Group will offer the following proposals to amend the LSC Act. They solicit consideration and comment by interested parties.

A. Strengthen Local Control: Section 1007(c) should be amended to:

(1) include the board appointment provisions currently in the LSC Appropriation Act (McCollum amendment) with appropriate modifications to take into account national support programs; clarify that the restriction on board compensation applies only to attorneys who receive compensation from the recipient on whose board they sit; prohibit any board appointment criteria based on political party affiliation; and permit communications between recipients and board appointing organizations;

(2) specify that the recipient is exclusively responsible for its overall operation subject to the provisions of the LSC Act and that the recipient board should determine broad policy matters of a recipient including:

(a) financial eligibility criteria;

(b) the policies that will govern the fiscal, administrative and representational activities of the recipient, in compliance with the provisions of the LSC Act and regulations;

(c) setting priorities for the utilization of available resources;

(d) the various services which the recipient will make available;

(e) determining the types of cases or matters attorneys may undertake to handle;

(f) determining how best to utilize staff attorneys, paralegals and other available and appropriate staff and nonstaff resources, including private attorneys and others, to provide legal assistance to eligible clients and to carry out activities relating to the delivery of legal assistance;

(3) Specify that the board shall not interfere with the lawyer-client relationship; must comply with the

provisions of the Model Rules of Professional Conduct on board conflicts; and cannot act on a case-by-case basis in determining case types or setting priorities, but may reconsider priorities in light of unforeseen circumstances.

B. **Strengthen and clarify priority setting:** Section 1007(a)(2)(C) should be amended to:

(1) subject priorities to the principles of section 1001 and any goals specifically set in legislation by Congress;

(2) require that all recipients (through their boards of directors) annually adopt a plan for utilization of resources including a review of priorities, and set priorities periodically through a process that involves a review of legal needs of clients and participation of clients, community groups, the organized bar in its service area, program staff, and private attorneys involved in the delivery of legal services to eligible clients;

C. **Deregulate Use of Private Funds:** Section 1010(c) should be amended to provide that non-LSC funds may be used by recipients for the purposes for which they are provided by the non-LSC funding sources as determined by those funding sources, so long as recipients adopt a system of recordkeeping which may include timekeeping and which discloses the types of activities supported by non-LSC funds.

D. **Improved monitoring and enforcement procedures:** Sections 1006(b)(1)(A), 1006(b)(5) and 1007(d) should be amended to:

(1) set criteria for and time limits on investigating complaints against grantees;

(2) require the Corporation to promulgate standards and procedures providing appropriate due process for monitoring, evaluation and complaint investigation, including standards for access to personnel and other sensitive records of recipients (e.g., records containing client confidences or secrets);

(3) provide for independent evaluations of a recipient's quality of representation;

(4) clarify when LSC can defund or deny refunding or take other significant adverse action including reductions in grants or contracts that must be proportionate to the violation that has occurred;

(5) clarify that hearings for termination or denial of refunding are to be provided when requested by an adversely affected party and that such hearings are to be held before

an independent hearing examiner, with an opportunity for appeal to the board.

E. Specifying the role of the Corporation: Section 1006(b)(1)(A) should be amended to prevent LSC from imposing restrictions or requirements on representation of clients that are in addition to or are inconsistent with the provisions of the LSC Act or other relevant law.

F. Reauthorization Term: Section 1010(a) of the LSC Act should be amended to provide reauthorization without a limit as to time.

Mr. McCALPIN. Strengthening the local boards and delineating their relationship with the Legal Services Corporation breaks down into several subdivisions.

First of all, we endorse the amendment of Mr. McCollum, which was adopted in an appropriations rider some years ago, requiring that the 60 percent of the local boards who are attorneys be named by the bar associations representing the attorneys in the service area.

We would suggest that that needs slight adjustment to take care of the problem of boards of national support centers which do not exist in one local area served by one bar association; that no political litmus test or affiliation be applied with respect to members of local boards; that a member of a local board who is the employee of another Legal Services grantee may not be disqualified from serving simply because he receives his compensation from a different grantee from that on whose board he sits.

And finally, it seems to us important to allow communications between a recipient, a grantee of the Corporation, and the entity which is permitted or required to name members of that Board. To require them to do it in total isolation and without communication, it seems to me is irresponsible and, indeed, in some respects, trespasses upon first amendment rights.

Our second proposal in this area—and all these relate to section 1007(C) of the act—is to make clear that it is the local board running the local program which decides policy in such areas as eligibility standards; the allocation of resources; setting priorities; the determination of the services to be offered, including substantive case area representation; the delivery system to be provided, and the utilization of people—staff, private attorneys, private volunteers of other disciplines, and the like.

Third, we believe that for the responsibility of the local boards effectively to be executed, we ought to have a revisiting of section 1007(a)(2)(C) of the act which talks in terms of local priority setting.

We believe that should be a more regularized, required process that ought to involve broad representatives of the community—the private bar, eligible clients, other service organizations, and the like—in order that there may be an effective and realistic local priority setting for the allocation of resources and the representation of clients.

We believe also that the Legal Services Corporation itself ought to have no role in that process of determining local priorities, the method of representation, and the subject of representation, in the area; that the local program ought to set that, in compliance with the act, specifically the purposes and goals of the act as set forth in section 1001 of the act and the purposes for which this great enterprise has been created.

Next, in this same area, we would incorporate ethical concepts under the new model rules which were not in effect the last time the Corporation was reauthorized, and decisions under those rules, that the local board not interfere in lawyer-client relationships which exists with clients of the program.

Finally, we would deny to the Legal Services Corporation the right to impose restrictions on areas or methods of representation

in addition to, or inconsistent with, those in the Legal Services Corporation Act.

In some respects, as I pointed out, these proposals are at variance with McCollum-Stenholm proposals which would have the local boards act in specific case selection and representation. McCollum-Stenholm would interject the Board between the lawyer of the program and the client of the program to determine whether the representation will be provided and how it would be provided.

This transgresses upon the independent exercise of judgment by the lawyer in the program, and it runs the risk that the Board member who represents other entities in the community may find himself in a conflict of interest with the rights of the client of the program and his own clients in his private practice, remembering that 60 percent are private lawyers appointed by the bar association.

Our proposals, on the other hand, will preserve the proper rule of the Board, protect the independence of the lawyer and require adherence to ethical rules.

A second area in which we believe McCollum-Stenholm is at variance with our recommendations is in the earmarking process. They would mandate funds for certain areas decided at the national level. The two suggestions are drug enforcement and child support.

We submit that no case has been made for representation across the country by every program in those areas. Those decisions are better left to the people running the local program.

And finally, competitive bidding. Again, their proposals would have the Corporation at the national level decide who would provide the service; what service would be provided. You heard a good deal about that 2 weeks ago, and I dare say you will again. I will not belabor the point.

The second general area which is addressed by our proposals has to do with that contentious area of the utilization of private funds. McCollum-Stenholm would subject all funds received by a local grantee, regardless of source, to the provisions of the Legal Services Corporation Act.

We all recognize, and I think the chairman did earlier this morning, that Federal funds are not adequate to meet the need. Indeed, the number which is usually used is that the local programs are meeting only 20 percent of the need on a nationwide basis.

Programs, therefore, need to seek other funds to meet that demand which cannot be met with the Federal funds.

Why should any contributor not have the right to say how his funds are to be used? If I want to give money to Legal Services of eastern Missouri to provide a certain representation —and that's the best entity to do it—why should I not be permitted to give that money to that entity to do that?

And why, indeed, should not Legal Services of eastern Missouri be able to use funds to meet local needs as determined by them and by a local contributor of funds to meet those needs?

I'm talking about funds provided by States, and States do provide these funds, public funds. I'm talking about IOLTA funds, which are also generally recognized as public funds. I'm talking about

funds that come from the United Way in the communities across the country, and from private corporations and individuals.

Everybody recognizes the right of the Congress to determine how public funds should be used. It seems to me the other side of that coin is that private contributors ought to have the right to decide how their funds are to be used, particularly when private funds are so necessary to meet the needs which cannot be met with public funds.

Present regulations of the Corporation require that the utilization of those private funds be disclosed so that it is entirely possible for an examiner to go in to look at a local program and determine how those private funds are being used. That really is not an issue under the present regulations.

The third area of our recommendations has to do with monitoring and evaluation. I'd like to separate those concepts which sometimes, it seems to me, are inappropriately mixed in the act.

Monitoring, I believe, has two aspects: One is an auditing aspect—tracing the funds; how the funds have been used. There's absolutely no doubt that there must be strict accountability for the utilization of those public funds, and any funds. The programs ought to be required to adhere to generally accepted accounting standards; they ought to use the funds for the purposes for which they have been provided.

Our position is that the statutes relating to Federal funds clearly apply, the regulations apply, and that there really is no need for the McCollum-Stenholm criminal law proposals.

The other aspect of monitoring is compliance with the substantive provisions of the Legal Services Corporation Act and the regulations promulgated by the Corporation. Here, we believe, due process is badly needed and sadly lacking in the processes which have been employed by the Corporation to date.

We strongly urge that the Corporation be required to publish standards and procedures so that they are known by all that time limits be imposed on these monitoring compliance visits, and that the programs have a chance to respond before there is any finding or publication of finding—and we've had an example of the reverse of that in Texas in the recent past.

And, finally, we suggest, contrary to the present structure of the act, that when a finding has been made in terms of noncompliance, that there ought ultimately to be an opportunity for the program to bring its case to the Board of Directors of the Legal Services Corporation that that process not stop at the president as it now does, with the only alternative thereafter to go into court. We think that if it comes to the Board, particularly if it is as responsible as the new Board, we can avoid unnecessary litigation.

The evaluation, on the other hand, I submit to you, deals in terms of the effectiveness of the program in accomplishing the purposes of the act. In an earlier day, I am pleased to say, that evaluation process was supportive and corrective. In recent times, it has been adversarial and punitive. I would hope that we can return to the earlier time by having an evaluation which assists the programs in meeting the purposes of the act and is not punitive and penal in nature in looking for the slightest transgression to engage

in the 9.95 percent defunding, which was mentioned a few moments ago.

Finally, Mr. Chairman, I would hope that with 15 years of experience under the Legal Services Corporation Act, we could avoid the 2-, 3-year reauthorization that we've had in the past. Everybody, on both sides—as I think Mr. Erlenborn mentioned—agrees that the Legal Services Corporation performs a vital function; it ought to stay in effect. The Congress will have plenty of opportunity to amend the act and deal with it as it must. But I suggest that we not have to go through this process every 2 or 3 years; that we not need this problem of no reauthorization and, therefore, it's taken out of the State-Justice Appropriation Act and has to be dealt with separately.

I would hope that you might reauthorize the Corporation without limit as to time.

Let me conclude by saying that the program as it exists today is not perfect. It has worked extraordinarily well, however, considering it's far-flung nature—325 grantees across the country. I estimated coming in on the plane last night that perhaps $3 billion has been expended in this effort over the last 15 years; that we have served 15 million clients; that there have been somewhere between 50,000 and 100,000 employees of these programs over that period of time; that there are presently 130,000 private attorneys providing legal assistance to these programs.

We have demonstrated that our system can work for the poor as well as the rich. We have added to the establishment of justice, which the Preamble to the Constitution requires of our Government—"to establish justice."

We have given life and meaning to that legend on the facade of the Supreme Court: "Equal justice under law." I hope that you will perfect, and not hamper, the Corporation as it moves forward.

Thank you.

Mr. FRANK. Thank you, Mr. McCalpin, that was very comprehensive. I would hope you might want to give seminars on how people can take a lengthy written statement and summarize it in a way that presents its essence and saves time. That is a unique talent that I wish would be infectious.

[The prepared statement of Mr. McCalpin follows:]

PREPARED STATEMENT OF F. WM. MCCALPIN, PRESIDENT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

My name is F. Wm. McCalpin. I am a lawyer in private practice in St. Louis, Missouri, appearing before you today as the incumbent president of the National Legal Aid and Defender Association. It has been my privilege to appear before Mr. Kastenmeir's Subcommittee on earlier occasions, sometimes representing the American Bar Association and on other occasions in my capacity as the then Chairman of the Board of the Legal Services Corporation. My principal purpose today is to urge you to consider several proposals to amend the Legal Services Corporation Act which have been developed by NLADA, our companion organization, the Project Advisory Group, and other individuals and entities who are engaged from day to day in delivering civil legal services to indigents in this country.

NLADA, which was founded in 1911, includes among its membership 741 civil legal aid programs throughout the United States, as well as 1,047 individual members, the great majority of whom are lawyers or law firms. The Project Advisory Group is the national organization of legal services programs. Through our staffs here in Washington and our officers, boards of directors and committees we provide our members with information, training and support as they fulfill their professional obligation of providing legal services to poor people across America.

First let me thank you, Mr. Chairman, for moving forward with consideration of the reauthorization of the Legal Services Corporation. It has been a long time since we have come to the

table together, so long in fact that I believe a short review of where we have been would not be amiss.

It is nearly 16 years since the Legal Services Corporation Act completed its legislative journey and was signed into law by President Nixon in July 1974. More than 12 years have passed since the Corporation was reauthorized by the Legal Services Corporation Act Amendments of 1977. The Corporation has been without Congressional authorization since September 30, 1980, nearly ten years. Aside from riders in annual appropriation acts, the last time that reauthorization legislation passed out of this Committee and through the House of Representatives was nine years ago when H.R. 3480 was adopted, but it died in the Senate.

Much has happened since then. By virtue of stringent fiscal policies in the last ten years, we have today a substantially different poverty population. New ethical rules have been adopted in nearly every state in the union governing the conduct of lawyers and opinions have issued interpreting those rules in the context of legal services to the poor. We have had a succession of directors and officers of the Legal Services Corporation, some of them openly bent on destroying the Corporation or severely hampering its efforts to provide legal services as contemplated by the Congress. Finally I submit to you, this is the sixth Congress to sit since the Corporation was last reauthorized and the personnel on the relevant committees of both Houses have changed

significantly. In view of these facts I think it may be useful to review a bit of history and restate some underlying basic principles.

I need not remind you that in the Preamble to the Constitution our forefathers stated clearly and forcefully the purpose of the government they were creating.

> We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense . . . .

and so on. It is noteworthy that "establish justice" precedes and is the basis for "domestic tranquility" and that both come before "provide for the common defense." I think that sequence and those priorities are not accidental.

Until passage and implementation of the Economic Opportunity Act of 1964 the federal government had not sought to establish justice for poor people by providing support for their representation in civil legal matters. Then for the first time the federal government filled this void in the objective stated by our forefathers in the Preamble of the Constitution "to establish justice." Even then, this support was not a legislative mandate but was accomplished through administrative action by Sargent Shriver as the Director of the Office of Economic Opportunity. It

was not until legal services was included as a line item in the budget of OEO that the Congress gave formal, legislative support to this cornerstone of our justice establishment.

The OEO legal services program stepped on political toes. Senator George Murphy of California led the drive for an amendment to the Economic Opportunity Act which would have prohibited legal services programs from bringing actions against government at any level. Then Vice President Spiro Agnew levied virulent attacks on legal services programs because one represented indigents being displaced from their homes by a highway project. This led to the concept of the Legal Services Corporation which was characterized in House Report No. 93-247 as ". . . a bipartisan effort to establish an independent corporation to replace the Legal Services Program," at p. 1. Critics of the legal services program in recent years and proponents of restrictive legislation have frequently misrepresented the basic function and purpose of the program by stating that it has departed from an original intent of one on one representation of poor people and has erroneously strayed into representation of the poor in political issues. Such statements are totally at variance with the history of the legislation.

That same House Report No. 93-247 quotes the following from President Nixon's recommendation in his 1971 message urging creation of the Corporation:

> Much of the litigation initiated by legal services has placed it in direct conflict with local and State governments. The program is concerned with social issues and is thus subject to unusually strong political pressures. . . . However, if we are to preserve the strength of the program we must make it immune to political pressures and make it a permanent part of our system of justice.

The House Report subsequently quotes Frank Carlucci, a former director of the OEO and subsequently Secretary of Defense, and Robert W. Meserve and Edward L. Wright, both presidents of the American Bar Association to the same effect. The Senate Report (No. 93-495) contains similar views of the late Senator Robert Taft.

The Statement of Findings and Declaration of Purpose contained in Section 1001(2) of the Legal Services Corporation Act finds and declares that it is the purpose and intent of the Act ". . . to continue the present vital legal services program." If there were any doubt as to what that "present vital legal services program" was, that doubt was resolved when the Congress amended the Act in 1977. House Conference Report No. 95-825 at page 9 states:

> The Senate amendment clarifies the Congressional intent respecting the scope and purpose of the legal services

program by specifying that the program is intended to assist the improving opportunities for low income persons consistent with the purposes of the Economic Opportunity Act of 1964, as amended.

There is no comparable House provision.

The House recedes.

Since at least 1967 the OEO legal services program had included as an important element so-called impact litigation much of it directed at changing the way government at all levels treated poor people. While Congress has in the meantime imposed certain limitations on such litigation brought in the form of class actions, it has clearly not denied to the legal services programs the right to engage in representation other than one poor person vs. one poor person or vs. one defendant.

The fact that the programs are entitled and even mandated to provide representation with a social content adverse to state and local governments generating possible political controversy is underlined by the reactions to the 1977 amendments to the Act. Mr. McClory in expressing his views on those amendments stated:

The purpose of this legislation should be to provide traditional legal representation for the poor.

Unfortunately, the reported legislation misses that mark.

House Report 95-310 at U.S. Code Congressional Service page 4526.

In his minority views, Mr. Ashbrook noted that effectiveness in law reform is a significant factor weighed in determining levels of funding to local legal services projects. Id. at 4528. Perhaps the most persuasive contradiction of this latter day misrepresentation of the nature of the legal services program supported by the Corporation is contained in the supplemental views of Messrs. Moorhead, Hyde and Kindness in opposing the 1977 amendment. They state inter alia, "The Green Amendment was meant to focus on the intent of the original legislation, which was to provide for assistance to an individual poor client who needed an attorney." They note, "The repeal of the Green Amendment is the most significant change proposed by H.R. 6666." Id. at 4529.

There is no support clearly in the Act or the legislative history for the notion that representation of poor persons was intended to be limited to non-controversial one on one representation. From the very beginning it has been recognized, even by the then President of the United States, that such representation involves social issues, concerns state and local governments and has political repercussions. From the very beginning the Legal Services Corporation Act was intended to continue what it termed as the vital legal services program of the

OEO. That legal services program provided the kind of representation which President Nixon described and which did indeed produce political repercussions from Senator Murphy and Vice President Agnew.

From this legislative history certain conclusions and principles can be drawn. First of all, it seems clear from the findings and declarations contained in Section 1001 of the Act that it is intended to implement the Constitutional mandate "to establish justice" for poor people. Second, the justice to be established is that broad area of justice which was the objective of the legal services program of the OEO. Third, it is quite obvious from the history of the Act, the reauthorization and the appropriation riders that the Congress expresses its intent with respect to the scope of representation to be provided and that it is inappropriate for the administrators of the program to impose restrictions on substantive or procedural representation not specified by the Congress. Fourth, the very reason for the creation of the Corporation mandates that representation by its grantees is not to be bent to the views of partisan political or ideological considerations.

Against this background and from my perspective as a former "insider" at the Corporation and my subsequent experience with the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, as well as in the leadership of NLADA, I

would like to share with you some of my thoughts and offer some recommendations as you proceed to restructure the Act.

There is no enterprise that cannot benefit from time to time from efforts to enhance and improve it. Anything we do, whether it be in government or in the private sector, we can do better. That certainly includes the delivery of legal services to poor people in this country which has been evolving in form and in scope now for more than a century.

What we have today is a fundamentally sound legal services delivery system which, though woefully underfunded and continually besieged, continues to work extraordinarily well for our clients. It can be made to work better. I am not the first to tell you that, but I echo the statement of others. The basic system has served us well for twenty-five years; it should not be undermined.

As I have indicated, NLADA, PAG and others who are interested in improving legal services to the poor have been working for some time to develop specific proposals that we believe can both strengthen the program and lower the decibel level of recent divisive public debate. I would like briefly to summarize those proposals and the principles on which they are based. They fall into four broad categories:

1. Strengthening local control;

2. Deregulation of the use of private funds;

3. Improving monitoring and enforcement; and

4. Reauthorization without limit as to time.

LOCAL CONTROL

A fundamental principle which has undergirded the entire legal services system since its inception is that the program is controlled and directed, not by bureaucrats in Washington, but by local attorneys, clients and other citizens who understand the needs and resources of the community in which they live. The principle of local control and local priority setting was a sound one underlying the legal services program that was first established within the Office of Economic Opportunity in 1964, and that same principle was incorporated into the Legal Services Corporation Act in 1974. The Act and the legislative history are replete with provisions and comments about local decision making in the operation of the local programs. That also is the thrust of a policy resolution approved by the House of Delegates of the ABA in 1984.

Our strong belief is that the vehicle for and the nature of the legal services required in a particular community are best

decided by the persons in that community responsible for the conduct of the legal services program. In saying that, I am cognizant and comforted that Congress has required that 60% of the local boards must be lawyers named by bar associations representing attorneys in the local area and that one-third of the boards must be clients eligible to be served by the program. This, it seems to us, is a recognition of the reality that local problems are best identified and addressed by local people making local decisions. This concept of local decision making is tied directly to the priority-setting provisions in Section 1007(a)(2)(C) of the Legal Services Corporation Act.

We want to strengthen local control. To do this we propose that Section 1007(c) of the Act be amended to include the board appointment provisions, known as the McCollum Amendment, which are currently included in the LSC Appropriation Act, with slight modifications to take into account national support programs. Our proposed amendment would clarify that the current restriction on board compensation applies only to attorneys who receive compensation from the LSC recipient on whose board they sit; would prohibit any board appointment criteria based on political party affiliation; and would expressly permit communications between recipients and those organizations which have appointment authority over their boards.

Our amendment would specify that the local board of each

recipient, and not the Legal Services Corporation, is responsible for the overall governance of the program and should determine broad policy matters related to that recipient. This means that the local board, and not LSC, sets priorities in the allocation of available resources and determines the various services, i.e, representation, training, technical assistance, etc., that the program will make available. The local board is responsible for establishing financial eligibility criteria. The local board establishes policies that govern the fiscal, administrative and representational activities of the recipient, including compliance with provisions of the LSC Act and regulations. The local board, and not LSC, determines the types of cases or matters attorneys may undertake to handle. The local board determines how best to utilize staff attorneys, paralegals and other available and appropriate staff including private attorneys and others, to provide legal assistance to eligible clients and to carry out activities related to the delivery of legal assistance.

Our proposal would also specify that the local board must not interfere with the lawyer/client relationship of program attorneys; that board members must comply with the provisions of the Model Rules of Professional Conduct on board conflicts; and that local boards cannot act on a case-by-case basis in determining case types or setting priorities. On these three points our proposal is in sharp contrast with the McCollum-Stenholm amendment on local board authority which would apparently require local boards to act on

specific cases and to determine whether a specific class action should be brought.

What we are attempting to do here is to clarify the authority of local boards of directors and, at the same time, ensure that individual members of those boards are protected from potential conflicts. In many rural areas and small towns, attorneys may serve on the boards of local legal services programs while simultaneously representing private clients who may be adverse parties in actions brought by the program. If the law is clear that these boards of directors are not to determine whether a specific case should go forward, say, a class action lawsuit against the local utility company, but rather whether the program shall engage in particular types of activity, i.e., representing clients in consumer matters, those attorney board members will have no conflict. If, on the other hand, local boards were required by law or regulation to approve specific cases, there would be serious ethical implications; and the practical result would likely be that many attorneys would be forced to resign from these boards. That would clearly defeat the purpose of the McCollum Amendment and would create severe governance problems for many programs. We believe our approach is best for programs and for the attorneys who serve on their boards.

We also want to <u>strengthen and clarify the local priority setting provisions</u> of the Act by amending Section 1007(a)(2)(C).

Program priorities would be subject to the principles enunciated in Section 1001 of the Act as well as to any goals specifically set forth in legislation by Congress, but the Corporation would not have the authority to establish its own separate goals. This is necessary not only to preserve local control but also to make the programs immune to political pressures as its progenitors intended.

We would also require that all recipients, through their boards of directors, undertake an annual review of priorities and set priorities periodically through a process that involves a review of the legal needs of clients in the community. That legal needs assessment would require the participation of clients, community groups, the organized bar, program staff and private attorneys involved in the delivery of legal services to eligible clients.

Our proposals also seek to <u>delimit the role of the Corporation</u>. Section 1006(b)(1)(A) should be amended to prevent LSC from imposing restrictions or requirements on representation of clients that are in addition to or are inconsistent with the provisions of the LSC Act or other relevant law. The intent of this proposal is quite simply to clarify that Congress retains the sole authority to impose restrictions on representation by legal services programs.

The general thrust of the McCollum-Stenholm proposals, we

believe, is not consistent with the principle of local control. Let me speak specifically to why we believe our approach is preferable to the notion of earmarking funds or to a competitive bidding scheme where all decision making authority rests with the President of the Legal Services Corporation.

The McCollum-Stenholm "reform" package includes a proposal to earmark funds at the federal level for child support enforcement and drug-related representation, regardless of a demonstrated need for those services in a given locality. The merits, or lack thereof, of earmarking for these particular services have already been presented to the Committee by previous witnesses. I will not belabor that point. Our position is this: the Legal Services Corporation does not now, nor has it ever, nor should it set national priorities. Instead, local program boards, based on a legislatively mandated process to determine the needs of clients within their service areas, should decide how to allocate scarce resources, what types of cases to take. LSC has not conducted any studies to determine whether these two problems, or any others, are significant ones for eligible clients. Clearly the impact of drugs is not the same in some rural communities as in other large urban areas; just as clearly existing child support enforcement efforts of state and federal agencies are meeting the need in many areas but perhaps not in others. Local programs, on the other hand, regularly reexamine the needs of the client communities they serve to determine what their program priorities should be.

The earmarking proposal flies in the face of the concept of local control. Priority setting should remain with the boards of directors of local programs whose members -- attorneys practicing in the community, client representatives and other local citizens -- are in the best position to determine the needs of their own communities.

Similarly, the competitive bidding scheme envisioned by the current staff of the Legal Services Corporation and incorporated in the McCollum-Stenholm package strikes at the very heart of the locally controlled delivery system that has serviced us so well for more than two decades. Under the scheme proposed by the departing president of the Corporation, providers would not even have to have a local board of directors. It does seem ironic to us that the same package of so-called "reforms" that calls for what we believe is an inappropriate level of involvement by the local board in specific cases also proposes a system that would obliterate local control.

If the Corporation's vision of "competition" should come to pass, decisions as to the legal needs of low-income people would be made, not by local people on the basis of local needs, but by LSC bureaucrats in Washington, D.C. They could decide to fund only divorces in Houston and only child support enforcement in Boston. Housing assistance might be on the LSC agenda in Des

Moines but unavailable to a single mother in Cleveland. LSC would not assure that there would be a general service provider available in each service area. Clients with a multitude of problems would no longer be able to get the help they need in one place but would be required to find their way through a confusing maze of unconnected service providers. Local control and local accountability would be no more.

We believe that would be a disaster for our clients. We urge you not to move forward with any proposal for competitive bidding without first directing the Corporation to study, test and evaluate their proposed system.

PRIVATE FUNDS

Closely related to our goal of strengthening local control and local priority setting is our proposal to deregulate the use of private funds received by LSC grantees. We believe Section 1010(c) should be amended to provide that non-LSC funds may be used by recipients for the purposes for which they are provided as determined by the persons or entities who provide them, so long as recipients adopt a system of recordkeeping which may include timekeeping and which clearly discloses the types of activities supported by these non-LSC funds. This is in contrast to the McCollum-Stenholm proposal which would apply the same restrictions placed on LSC funds to all "non-public funds" received by LSC

grantees. It should be noted that while the current language in McCollum-Stenholm is "non-public funds," Mr. McCollum made clear when he appeared before this Committee two weeks ago that his intention is to restrict all funds, whether private or public.

Just as we would argue that Congress retains the right to determine what activities are prohibited with LSC funds, we believe that other funders, whether private charities or state government agencies or IOLTA programs in various states, have the same right to determine how their funds are to be used. If the board of directors of a local LSC grantee sees, as a particular need in its community, service to elderly and disabled clients or victims of domestic abuse who may not meet LSC's financial eligibility guidelines, why should they not be permitted, and indeed encouraged, to seek private funding for that purpose? If a state government decides to provide funding for legal services to the poor, whether through direct appropriation or filing fee surcharge or other means, can that government not determine to whom those funds will be granted and what services can be provided? And what about IOLTA funds? Every state in the nation now has an approved IOLTA (Interest on Lawyers Trust Accounts) program. These programs, some of which are legislatively established and some of which are judicially mandated, were initially conceived in the early 80s to supplement LSC-funded services, not merely to duplicate them. IOLTA grant decisions are made by local governing bodies who are acutely aware of critical unmet needs in their

states. Should not those bodiss have the right to direct their funds to the entities they belisvs are best qualified to deliver the servicee they wieh to fund? Should not they be the ones to determine what thoss services will be?

Surely the proponents of theee restrictions on non-LSC funds do not believe that the United Way of Greater Los Angeles or the Massachusetts Legal Assistance Corporation or the Florida Bar Foundation's IOLTA Program must find a provider other tha: the established legal services program to deliver the legal services they wish to fund, even if that program is clearly the beet qualified to provide the service. Does the Congress wish to discourage these private and public efforts to narrow the huge gaps in services that exist for poor people all over the country? Every one recognizes that federal funding meete only a small fraction of the need. Programs must seek additional, outside funding. Don't hamstring them in the their efforts. We believe that efforts to restrict the use of these private and non-LSC public funds are unwise and probably unconstitutional. We urge the Subcommittee to reject them.

We recognize fully the need for LSC grantees to account for all of the funds they receive from other sources and to report the use of thoee funds separate and distinct from Corporation funde, pursuant to generally accepted accounting principles Our proposal provides that the governing body of each LSC grantee shall adopt

a record keeping system, which may include timekeeping and which discloses the types of activities supported by the non-LSC funds. Subject to these recordkeeping requirements, non-LSC funds could then be used in accordance with the purposes for which they are provided by the funding source.

A word about timekeeping. The McCollum-Stenholm package would impose burdensome, national, timekeeping requirements on all LSC grantees which apparently could not be adjusted to respond to the needs and characteristics of individual programs. We would simply echo the recommendation of the General Accounting Office in 1988 that before imposing any timekeeping requirement, LSC should survey recipients to determine what information they now collect; what information LSC needs to monitor performance; establish objectives for any management information that would be required by LSC; and systematically analyze and assess the costs and benefits of any national information system. Until such time as LSC has completed those steps, we urge the Subcommittee to reject national timekeeping.

MONITORING AND ENFORCEMENT

There is one other area in which we would like to offer a proposal for the consideration of the Subcommittee. In order to improve monitoring and enforcement procedures, we propose that Sections 1006(b)(1)(A), 1006(b)(5) and 1007(d) of the LSC Act be

amended. Our amendments would establish criteria for and time limits on investigating complaints against recipients. They would require the Corporation to promulgate standards and procedures to provide due process in monitoring, evaluation and complaint investigation, including standards for access to personnel or other sensitive records of recipients. They would provide for independent evaluation of a recipient's quality of representation.

Our proposed amendments to these sections would also clarify when LSC can defund or deny refunding or take other significant adverse action, including reductions in grants or contracts that must be proportionate to any violation of the LSC Act or regulations. They would also clarify that hearings for termination or denial of refunding are to be provided when requested by an adversely affected party and that such hearings are to be held before an independent hearing examiner with the opportunity to appeal to the LSC Board of Directors.

Over the past several years, the monitoring function of the Legal Services Corporation has changed from an evaluative process that sought to improve services to the poor, to a highly adversarial process that has sought as a primary objective to punish grantees for often misperceived transgressions. We want to move the process back in the direction of firm but fair evaluation and oversight, we want to clarify tne due process rights of grantees, and we want to ensure that when violations are

determined, appropriate sanctions are imposed. In other words, we want the punishment to fit the crime and be administered in accordance with appropriate due process procedures.

REAUTHORIZATION WITH NO TIME LIMIT

Finally, Mr. Chairman, we propose to amend Section 1010(a) of the LSC Act to provide for reauthorization without a limit as to time. If the last decade has taught us anything, it is that Congress wishes the Legal Services Corporation to remain with us. We can spare ourselves, not to mention the Chairman of the Appropriations Subcommittee, Mr. Smith, untold misery if we simply reauthorize the Corporation's without a time limit.

To summarize, Mr. Chairman, we urge you to reauthorize the Legal Service Corporation with a mandate at least as broad as envisioned in 1974 and 1977 and without further restrictions so that as our Pledge of Allegiance aspires there may be "liberty and justice for all." The proposals we bring to you today are intended to attain that goal by strengthening local control and local priority setting while clarifying the role of the Corporation; permitting the use of private and non-LSC public funds for the purposes for which they are provided, so long as recipients adopt an appropriate recordkeeping system; improving the Corporation's monitoring and enforcement procedures; and reauthorizing the Legal Services Corporation without a time limit.

We have given much thought to these proposals and to language that would implement them. We will be happy to work with the staff of the Subcommittee as you draft the legislation you ultimately report to the full Judiciary Committee.

Again, Mr. Chairman, I commend you and your colleagues for undertaking this important task. We look forward to working with you as the reauthorization process proceeds.

Mr. FRANK. I just have two questions, and I appreciate the fact that you accommodated your schedule to be with us today. I know that it was a little difficult for you.

I think you make an important point about the competitive bidding. We have the McCollum-Stenholm amendment, which our colleagues sponsored, which I think has been beneficial—which I have helped to enforce, at the request of the Board in some cases when there were programs out of compliance; and that is that the majority be local control. You made, which seemed to me a very interesting point, that it would be very difficult, it would seem to me at first—or virtually impossible—to accommodate that to the competitive bidding situation. I guess we would have to make that, if we were to try to present that to a competitive bidding —and if you happened to be an entity that didn't have such a Board, you would have to create one for the purpose of the bid; the bid would be for a limited period.

Am I correct, that that would be a real difficulty in terms of——

Mr. MCCALPIN. I think it is; and then you have to involve the clients, as the act requires; you have to have a third of the governing body be clients. And if you make the award to a law firm, I'm not so sure my partners would be delighted in having clients engaged in the determination of what the law firm does.

Mr. FRANK. Currently, it's the local bar association that has to make some selections of the Board; is that correct?

Mr. MCCALPIN. Only of the 60 percent of the Board who——

Mr. FRANK. Right. But that would mean if you became the successful bidder, say your law firm—and your law firm would, for that purpose, be subjected to the 60 percent, which would include some of your competitors for these purposes; is that correct?

Mr. MCCALPIN. I think it's very unclear how the 60 percent would work in competitive bidding.

Mr. FRANK. Thank you.

One other issue that I had that I temporarily forgot, so I'll turn to Mr. Smith while I remember it, and I'll come back to it.

Mr. SMITH of Texas. Thank you.

Mr. McCalpin, during your testimony you mentioned several times, or used the word "priorities" several times. I was going to ask you, what specific types of cases you feel should receive the greatest priority by LSC attorneys, given their limited time and limited resources?

Mr. MCCALPIN. I think that varies, Mr. Smith, from community to community. In some communities it will be housing matters; in others it will be welfare matters; and in others it may be dealing with merchants in consumer matters.

Let me say this: I don't think that any program will concentrate all its effort in one area.

Mr. SMITH of Texas. I understand that; but you mentioned some priorities and that helps me.

Do you think that LSC attorneys are adequately addressing the problem that many low-income women have in obtaining child support payments?

Mr. MCCALPIN. First of all, I think you have to understand—I don't remember the figures exactly—but I believe it's a billion and a half, or thereabouts, that the Federal Government is putting into

enforcement of child support orders now, in addition to others. That's five times the entire appropriation to the Legal Services Corporation.

I think that to the extent that that is a problem in a local area which is not being met by funding from other sources, then the local programs are deciding whether and how far to get into that.

Mr. SMITH of Texas. And presumably, it should receive a top priority by LSC attorneys in that locality; is that correct?

Mr. MCCALPIN. It could be. In other words, they may say, we will spend 30 percent on this, 30 percent on this, 30 percent on child support, and 10 percent on something else.

Mr. SMITH of Texas. OK, fine.

Do you feel that LSC attorneys are abiding by the regulation against getting involved in redistricting cases?

Mr. MCCALPIN. Oh, yes, redistricting cases are a tiny, tiny minority of what is going on. I don't think that there has been——

Mr. SMITH of Texas. But my question was really, there is a regulation against getting involved in redistricting cases; do you think that that is being adhered to?

Mr. MCCALPIN. I know of no instance in which it is not.

Mr. SMITH of Texas. OK.

Also, I'm sure you're very familiar with the attorney's code of ethics which says that, "attorneys," as I understand it, "should not solicit clients."

Do you feel that LSC attorneys are abiding by the spirit of that code of ethics?

Mr. MCCALPIN. I believe so.

Mr. SMITH of Texas. And they're not soliciting clients?

Mr. MCCALPIN. Let me say, you know that there are decisions of the Supreme Court of the United States having to do with soliciting clients and how that applies.

I believe that the Legal Services attorneys are in compliance with the ethical rules as construed and approved by the Supreme Court of the United States.

Mr. SMITH of Texas. OK.

The next question is, do you feel that Legal Services attorneys should represent drug dealers?

Mr. MCCALPIN. As a business enterprise? No.

Mr. SMITH of Texas. No, no. As I understand it, that has occurred. I just wondered whether you approve of that practice or not.

Mr. MCCALPIN. I don't think you can answer the question in that broad scope. Obviously, they can't represent drug dealers in a criminal prosecution. It's absolutely barred by the statute.

I don't think that a Legal Services operation should represent a drug dealer in setting up a network for distribution of——

Mr. SMITH of Texas. You're taking an exaggerated example. That's not what I'm talking about.

Mr. MCCALPIN. If, as has been indicated earlier, I believe—you may not have been here; Mr. Erlenborn answered questions on this subject—if a person is simply accused of dealing with drugs, and he is then—or she—the subject of an eviction proceeding by a landlord, and the person otherwise qualifies under the eligibility standards, I think that it is not inappropriate to provide that representa-

tion. But more particularly, if the problem is that a 14-year-old kid is a runner——

Mr. SMITH of Texas. You answered my question, I think, with the statement just before that. But my followup question to that is, do you think that that's really advancing the war on drugs to have LSC attorneys representing individuals who have been charged by their landlord with drug dealing?

Mr. MCCALPIN. I don't think that it inhibits the rights of citizens of this country to give them the procedures allowed by law in terms of——

Mr. SMITH of Texas. No, no, I'm not——

Mr. MCCALPIN. And I'm not sure that the Legal Services Program ought to be the primary element to a war on drugs.

Mr. SMITH of Texas. Again, that's not what I'm talking about. I'm not suggesting that LSC should or should not.

What I'm suggesting to you is that I'm not sure it's a legitimate role of LSC attorneys to be involved in representing drug dealers in the situation that you just talked about.

Now, that may not be the priority that should be given to the time of LSC attorneys, but apparently you feel that it's a legitimate use of their time.

Mr. MCCALPIN. I think it's to be decided at the local level by the local program or——

Mr. SMITH of Texas. And if at the local level and local LSC attorneys feel that it's right to represent drug dealers, you think that's all right?

Mr. MCCALPIN. I don't want to be trapped into answering a question which is far more complex than the simplicity in which you have presented it.

Mr. SMITH of Texas. It seems to me it's a pretty simple question that deserves a simple answer.

Mr. MCCALPIN. I don't think it is a simple question.

Mr. SMITH of Texas. Well, I think you've already answered it by saying that you feel it should be up to the local individuals, and if they decide to represent drug dealers, you condone that?

Mr. MCCALPIN. In some circumstances.

Mr. SMITH of Texas. In some circumstances.

Mr. MCCALPIN. Mr. Erlenborn made clear that accusation is different from conviction, and a member of the family being evicted——

Mr. SMITH of Texas. I understand that. I just feel that given the limited resources, given the limited time, given the number of other priorities, I'm surprised that LSC attorneys feel that under any circumstances they can devote their time and resources to defending those who have been charged with drug violations.

Mr. MCCALPIN. But they've only been charged; it hasn't been proved.

Mr. SMITH of Texas. Without getting into whether it's true or not, charged or not, or anything else, I disagree with you and I'm surprised to hear you say that it's a legitimate role of the LSC attorneys.

Mr. MCCALPIN. It could be.

Mr. SMITH of Texas. I will yield back my time.

Mr. EDWARDS [presiding]. Mr. Berman.

Mr. BERMAN. No questions.

Mr. EDWARDS. Mr. Campbell.

Mr. CAMPBELL. Thank you, Mr. Chairman.

I'd like to explore with you, Mr. McCalpin, just one part of your testimony, and that deals with the restrictions upon grantees to follow the mandates, the regulations, and the rules of LSC itself, in respect to the conduct beyond which is financed by LSC. This was one of the four points you made.

I wonder if you would be kind enough to give me a specific in the nature of what regulation, what constraint, imposed by LSC upon a grantee—give me one instance, for example—would, in your judgment, have been inappropriate for onerous or in some way not satisfactory for a particular grantee to your specific knowledge?

Mr. MCCALPIN. Suppose that a local program decides that a serious problem in its service area is the representation of elderly persons whose incomes may be over 125 percent of the poverty level and the AARP or some group of citizens decide that it's appropriate that those people that can't really afford market rates for legal services, so they raise private funds and say the Legal Services Program is the best one to provide this representation, even though they may not meet the eligibility standard.

Mr. CAMPBELL. And in such an instance, you would then consider it appropriate for the grantee to go ahead and take that particular case.

I take that you would not consider it an adequate alternative if LSC were to apply its rules with the additional requirement that there be no grantee otherwise available who would be willing to comply with the rule?

Mr. MCCALPIN. I guess it's a question of the most effective use of the resources. If the local program is obviously the one best able to provide those services effectively, economically, use the funds that way. Whereas, the alternative source may, for instance, not have attorneys, not have the resources to carry it out, so that an inordinate use of the funds might be required, it seems to me it's a local decision who is the most effective provider of the service.

Mr. CAMPBELL. I appreciate your answer, sir.

My question was a hypothetical one because this is not the regulation and so I'm beginning to explore possible middle ground, which I think would be consistent with your answer. Let me just try the question once more and then I will be done except for one question.

The idea would be that the grantee must abide by the regulations of LSC, unless to do so would create a substantial, measurable, palpable dimunition in the ability to provide the fundamental service, in which case then it would be acceptable for a grantee to go beyond the LSC guide.

That's what I had in mind.

Mr. MCCALPIN. Just to make clear your question—we're distinguishing between the grantee using Federal funds, the LSC——

Mr. CAMPBELL. Always.

Mr. MCCALPIN [continuing]. And using private funds from other sources.

Mr. CAMPBELL. It's not in dispute, I agree; that's what we're talking about.

Mr. McCALPIN. If there is an alternative source, I guess the private funds would be given to the other source and they would simply not come to the grantee if they can't be used by the grantee.

Mr. CAMPBELL. It's not quite the way I was asking the question. I was asking it a little differently.

I'm sure that the private source could provide funds to any number of charities, including legal service.

The question I had was whether it would be workable to have a rule wherein if an individual grantee could not abide by the LSC regulations, that that grantee could not then accept—with respect to funds other than received from LSC—that grantee could not go ahead and take the LSC funds unless there were no other grantee generally able to provide the service. That seemed to me a possible compromise.

Your response was, well, private sources of funds would no doubt come forward and be available for other services, other charitable purposes. But I don't think that was quite responsive to my suggestion, which would be that there be a presumption that the LSC regs do apply even as to non-Federal funded aspects, unless to impose that would be exceptionally onerous.

Mr. McCALPIN. There is a somewhat similar analogy in the fee-producing cases, that the LSC cannot represent a client in a fee-generating case unless the private bar would not take it, because of the circumstances. It's a somewhat comparable situation.

Mr. CAMPBELL. Good. I appreciate the analogy, that might be very helpful.

The last question, just as a matter of philosophy—and this is indeed my last—I wonder if you took a position or as an attorney and a scholar, you would support the move by Congress to reverse the *Grove City* case in the Civil Rights Restoration Act.

The reason I raise that—lest you think it's completely unrelated—is that in that context we dealt with precisely the question of whether a recipient of Federal aid indicated for one purpose would be obliged to follow the nondiscriminatory rules imposed by the Federal Government as to activities unrelated to the receipt of those funds?

Mr. McCALPIN. I hadn't, frankly, thought of the comparison of the *Grove City* case to this business of the use of public and private funds. I am, newspaper-wise, familiar with the *Grove City* case. I don't think I've ever read it. I guess that I have the same feeling that Federal funds ought not rule every aspect of an entity's operation simply because there is some degree of Federal funds involved.

Mr. CAMPBELL. I thank you for your candor.

You would have been in the minority in the House of Representatives on that vote.

Thank you.

Mr. McCALPIN. I'm frequently in the minority.

Mr. CAMPBELL. So am I. Thank you.

Mr. EDWARDS. Mr. Washington.

Mr. WASHINGTON. Mr. McCalpin, I wasn't aware of the fact that Legal Services attorneys represented people in criminal cases.

Mr. McCALPIN. They cannot; by statute they are prohibited.

Mr. WASHINGTON. So how would one be representing a drug dealer, defending a drug dealer.

Mr. MCCALPIN. That's what I was trying to explore with Mr. Smith, but I wasn't given opportunity to——

Mr. WASHINGTON. You have it now.

Mr. MCCALPIN. First of all, I guess technically a person isn't a drug dealer until he has been convicted.

Mr. WASHINGTON. That's what everybody else thinks in the law. John Connally from Texas wasn't a thief because the jury found him not guilty even though he was indicted and tried here in the District of Columbia.

Mr. MCCALPIN. So I think that to represent a person or a family, one member of which is accused of dealing in drugs is not representing a drug dealer, simply because there's an unsupported, unproved allegation.

Mr. WASHINGTON. Even assuming arguendo that a person has been convicted of being a drug dealer and is either appealing that conviction—first of all, if it's on appeal, it's not a final conviction, right?

Mr. MCCALPIN. That's correct.

Mr. WASHINGTON. And no loss of liberties or other rights of persons would suffer disability—a person would suffer as a result of a criminal conviction on a felony would obtain until the conviction is final; is that right?

Mr. MCCALPIN. Subject to the grant or denial of bail, that's true.

Mr. WASHINGTON. Moreover, drug dealers, like other citizens in our society, have other problems, too, don't they?

Mr. MCCALPIN. I'm sure they do.

Mr. WASHINGTON. One wonders—to go back to Mr. Smith's earlier question about the lack of the efficacy of the effort on behalf of Legal Services in representing people; I assume he meant people—and I would say people—most notably women, in child support cases; one wonders what dilemma, if you follow that line of reasoning to its conclusion, logical or illogical, would obtain if you had a person—a lady, let's say, who had three children, who lived in a housing project, and she had received a court order, say 5 years ago, for child support. And the husband, or the former husband, for whatever reason, decided not to pay; and she were under investigation for being a drug dealer. Would that mean that Legal Services attorneys wouldn't be able to represent her?

Mr. MCCALPIN. Obviously, there would be a conflict between the earmarking proposals of McCollum-Stenholm that wants to represent people in child support cases but not represent people where there's allegation of drugs. So you have a conflict exactly of the two earmarking proposals.

Mr. WASHINGTON. Attorneys usually are able to make those kind of decisions for themselves, aren't they?

Mr. MCCALPIN. Who, sir?

Mr. WASHINGTON. Attorneys.

Mr. MCCALPIN. It seems to me that, one, if child support is within the priorities of the local program, and if there is nothing more than a bare accusation of drug usage, there isn't any reason why the program shouldn't represent the woman for child support.

Mr. WASHINGTON. Can you look at a given individual and tell who is a drug dealer and who isn't?

I'm asking these rhetorical questions because if this debate comes up on the floor and the gentleman from Texas persists in that, I want to be able to have some response to offer.

Mr. SMITH of Texas. If my colleague will yield, I'd like to interject something here, if I may.

Mr. WASHINGTON. Sure, I'd be happy to yield.

Mr. SMITH of Texas. Not only my colleague, but my colleague from Texas.

Isn't it possible that occasionally some of these accusations might ripen into a situation where a person was actually found guilty of drug dealing?

Mr. WASHINGTON. Sure.

Mr. SMITH of Texas. And if so, then the attorneys would be representing individuals that were drug dealers, is not that case?

Mr. WASHINGTON. That's correct.

Mr. SMITH of Texas. OK.

Mr. WASHINGTON. If the person is convicted. But again, I think it's inappropriate to say that the person is defending a drug dealer.

First of all, the word "defending" connotes that a person is charged with a crime; and a citizen that is charged with crime is entitled to legal representation. And the Legal Services attorneys, under no circumstances, would be representing that person on that allegation so they would not be defending him.

Mr. SMITH of Texas. If my colleague would yield?

Mr. WASHINGTON. I'd be happy to yield.

Mr. SMITH of Texas. I think that's a fair distinction. The accused is not always guilty.

Mr. WASHINGTON. Right.

Mr. SMITH of Texas. But my point was simply that there are going to be many instances where the accused might be found guilty. That being the case, clearly by definition the LSC attorneys are representing drug dealers at that point.

Mr. WASHINGTON. But they would not be representing them on criminal charges, my dear colleague from Texas; they would be representing them on something that I hoped that you would be in agreement with.

Let's say a lady has three children and she is, for whatever reasons, convicted. The only way that Legal Services could represent her—first of all, she wouldn't be in jail; she'd have to be at liberty, and the person's case was on appeal.

We won't go into the merits of whether that makes her a drug dealer or not—let's assume for the sake of discussion that she is a drug dealer. But let's also assume for the sake of discussion that she has three small children and a court order that needs to be enforced—and no other means to have an attorney—my question to you is would you deny her the right to have a Legal Services attorney represent her to get the money, which actually flows to the children and doesn't go to the——

Mr. SMITH of Texas. If you would yield again?

Mr. WASHINGTON. I'd be happy to yield.

Mr. SMITH of Texas. My point is that in that situation that you've just described or in the situations that I've described, we

We will next call a panel from the Migrant Legal Services Programs, Ms. Mary Lee Hall and Mr. Valeriano Saucedo. Please come forward.

STATEMENTS OF VALERIANO SAUCEDO, ON BEHALF OF CALIFORNIA RURAL LEGAL ASSISTANCE

Mr. SAUCEDO. Good morning. With the permission of the committee, we would like to submit our written statements.

Mr. FRANK. Without objection, the written statements will be accepted for the record.

And while I'm at it, the written statement of our colleague, Mr. Miller, and a statement to be submitted by the union that represents Legal Services Workers for Mr. Loines.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF HON. GEORGE MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO TESTIFY ABOUT IMPORTANCE OF THE LEGAL SERVICES CORPORATION'S MIGRANT LEGAL ACTION PROGRAM.

AS THE AUTHOR OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (AWPA) WHICH ENACTED IN 1982, I AM ACUTELY AWARE OF THE HISTORICAL PATTERN OF ABUSE AND EXPLOITATION OF MIGRANT WORKERS. THE 1960 LANDMARK DOCUMENTARY, "THE HARVEST OF SHAME" APTLY DESCRIBED THE CONDITIONS MIGRANT AND SEASONAL WORKERS WERE LABORING UNDER IN THE 1970'S AND 1980'S, AND STILL LABOR UNDER TODAY IN 1990.

THE AWPA WAS PASSED IN RESPONSE TO DESCRIPTIONS OF THOSE HORRENDOUS CONDITIONS, THE LACK OF PROTECTIONS FOR THESE WORKERS, AND THE LACK OF ENFORCEMENT OF THE EXISTING FARM LABOR CONTRACTOR REGISTRATION ACT (FLCRA) BY THE DEPARTMENT OF LABOR. THE AWPA REGULATES THE RECRUITING AND EMPLOYMENT CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS. IT IS TODAY THE PRIMARY FARMWORKER PROTECTIVE STATUTE.

THE LAW REQUIRES ADVANCE DISCLOSURE OF WORKING CONDITIONS, DISCLOSURE OF LEGAL RIGHTS, AND DISTRIBUTION OF ITEMIZED PAYROLL STATEMENTS. THE ACT IMPOSES SAFETY AND INSURANCE STANDARDS FOR HOUSING AND TRANSPORTATION FACILITIES, AND PROHIBITS CERTAIN EXPLOITATIVE PRACTICES, SUCH AS COMPULSORY "COUNTRY STORE" ARRANGEMENTS AND RETALIATORY DISCRIMINATION AGAINST WORKERS WHO

REPORT VIOLATIONS.

THIS ANTI-DISCRIMINATION PROVISION IS AN INTEGRAL PART OF THE AWPA'S ENFORCEMENT STRUCTURE. WHEREAS THE EARLIER LAW, THE FLCRA WHICH WAS SUPERSEDED BY THE AWPA, DEPENDED UPON THE REGISTRATION

OF THE FARM LABOR CONTRACTORS AND ENFORCEMENT BY THE DEPARTMENT OF LABOR (WHOSE ENFORCEMENT OF THE LAW COULD BEST BE DESCRIBED AS MINIMAL), THE AWPA DEPENDS MORE UPON INDIVIDUAL COMPLAINTS AND PRIVATE RIGHTS OF ACTION IN FEDERAL COURT.

IN ORDER TO SHIELD WORKERS WHO REPORT COMPLAINTS FROM THE RETALIATORY ACTIONS OF THEIR EMPLOYERS, THE AWPA CONTAINS A PROVISION WHICH PERMITS ACTIONS TO BE BROUGHT ON BEHALF OF THESE WORKERS IN THE NAME OF "JOHN DOE."

THE AWPA IS NOT A FRIVOLOUS LAW. IT WAS CAREFULLY CRAFTED AND NEGOTIATED WITH INPUT FROM THE DEPARTMENT OF LABOR, AND NUMEROUS ADVOCACY AND INDUSTRY GROUPS FOR ALMOST TWO YEARS TO ENSURE THAT IT WAS A WORKABLE LAW.

NOW, TO MY DISMAY, SOME OF MY COLLEAGUES ARE SEEKING TO DESTROY THIS IMPORTANT LEGISLATION THROUGH AMENDMENTS WHICH SEEK TO LIMIT THE ABILITY OF THE LEGAL SERVICES CORPORATION TO SEEK REDRESS ON BEHALF OF MIGRANT AND SEASONAL WORKERS.

THE MIGRANT LEGAL SERVICES (MLS) COMPONENT OF THE LEGAL SERVICES CORPORATION PROVIDES HIGHLY PROFESSIONAL LEGAL REPRESENTATION TO THIS NEGLECTED POPULATION WHICH HAD HISTORICALLY BEEN DENIED

THEM.

MLS OFFERS FARMWORKERS COMPREHENSIVE LEGAL REPRESENTATION IN GENERAL LEGAL MATTERS AND TO ENFORCE SUBSTANTIVE FARMWORKER PROTECTIONS.

THE RECORD OF MLS IN AWPA CASES IS ONE OF WHICH THEY SHOULD BE PROUD. THEY HAVE WON 90% OF ALL THE REPORTED CASES AND SETTLED 90% OF THE REST FAVORABLY FOR FARMWORKERS UNDER THE AWPA. THEY

SUCCESSFULLY LITIGATED AND WON THE FIRST CASE TO REACH THE SUPREME COURT UNDER THE AWPA THIS PAST FEBRUARY.

THE FAIR LABOR STANDARDS ACT (FLSA), WHICH IS ALSO UNDER THE EDUCATION AND LABOR COMMITTEE'S JURISDICTION, AFFORDS THIS POPULATION PROTECTION FORM EMPLOYER ABUSES. BUT DUE TO THE DEPARTMENT OF LABOR'S INABILITY AND/OR UNWILLINGNESS TO ENFORCE THE FLSA AS IT APPLIES TO MIGRANTS AND FARMWORKERS, THE MLS PROGRAM HAS PLAYED A CRITICAL ROLE IN ENSURING THAT THE RIGHTS OF THESE WORKERS ARE ENFORCED.

IT IS ONLY THROUGH THE WORK OF THE MLS THAT THESE TWO LAWS ARE BEING ENFORCED AND IT HAS HAD A DRAMATIC IMPACT ON THE LIVES OF FARMWORKERS.

AND, IT IS ONLY BECAUSE THE MLS PROGRAM HAS BEEN SO SUCCESSFUL AND SO EFFECTIVE THAT IT IS NOW UNDER ATTACK.

AS THE AUTHOR OF THE AWPA AND AS ONE WHO HAS PUSHED FOR STRONGER

ENFORCEMENT OF THE FLSA, I AM GRATIFIED THAT THE MLS PROGRAM IS THE WATCHDOG OF THIS FORGOTTEN POPULATION.

WHEN WE GO TO THE SAFEWAY AND SEE THE FRUIT AND VEGETABLES ON DISPLAY, WE FORGET THAT THEY WERE PICKED WITH THE SWEAT AND TOIL OF THESE WORKERS, MOST OF WHOM LIVE AND LABOR UNDER CONDITIONS WHICH CAN BEST BE DESCRIBED AS INHUMANE. WITHOUT THE MLS PROGRAM AS IT CURRENTLY EXISTS, THEIR LIVES WOULD BE EVEN WORSE.

I URGE YOU TO REJECT ANY SO CALLED "REFORMS' AFFECTING THE RIGHTS OF THESE WORKERS OFFERED BY CONGRESSMAN STENHOLM AND MCCOLLUM, AND INSTEAD TO GIVE YOUR SUPPORT TO THE MLS PROGRAM OF THE LEGAL SERVICES CORPORATION.

[The prepared statement of Mr. Loines follows:]

PREPARED STATEMENT OF DWIGHT LOINES, PRESIDENT, NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS, DISTRICT 65, UAW

My name is Dwight Loines and I am President of the National Organization of Legal Services Workers, affiliated with the United Auto Workers. The NOLSW/UAW is a labor organization that represents employees of local Legal Services programs in thirty states around the country, including large urban programs and rural programs that primarily service farmworkers.

Mr. Chairman and members of the subcommittee this country is on the threshold of reaffirming its commitment to the principle of equal access to justice. In reauthorizing the Legal Services Corporation you have the opportunity to provide key leadership to the Congress as a whole and to the nation in giving real meaning to that commitment.

As you consider the reauthorization of the Legal Services Corporation you should keep in mind that this program is tremendously popular with the American people, and has always enjoyed phenomenal by-partisan support. Its popularity belies the shrill cry of those who claim that the program is in dire need of "reform" to eliminate alleged abuses.

Mr. Chairman, I would like to address two basic themes that underlie the McCollum-Stenholm proposals. The first is that poor people should not enjoy the same procedural and substantive rights as other litigants who appear before the courts of this nation. That sentiment is not worthy of anyone who professes respect for the legal system of this country and a belief in the rule of law.

If Congress is not in a position to fully fund the provision of legal representation to all those who need representation but

can't afford to hire a lawyer, the least that it can do is to insure that poor people not be forced to stand at the bar of justice with one hand tied behind their backs.

Prohibiting redistricting cases is a blatant attack on the rights of the poor to bring law suits under the Voting Rights Act and the U.S. Constitution, to challenge political districts that illegally dilute their voting rights because of race. On the one hand many conservative groups argue that the judicial activist have championed the rights of racial and political minorities over majorities on matters that are best left to the political process. Now those same groups oppose the right of poor people to use federal law to insure a level playing field in the political process.

Restrictions on the ability of Legal Services attorneys and paralegals to provide representation to migrant workers would deprive the most exploited workers in this country effective legal counsel. That would be an abomination. It is a total fabrication to say that the agricultural community in this country is somehow being victimized by Legal Services advocates. There has simply been no showing whatsoever that the laws, procedural safeguards, and professional standards that apply to all attorneys who file frivolous law suits are not adequate to guard against any potential abuse when agricultural interests are involved. In fact NOLSW/UAW is unaware of any disciplinary action or penalty that has been imposed on any Legal Services attorney in connection with litigation concerning farmworkers.

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The second theme underlying the "reform" proposals is that there is a need to make fundamental structural changes to the Legal Services Corporation. The very fact that the program survived through the eighties is powerful testimony to the wisdom of the existing structure as fashioned during the Nixon administration.

Competitive bidding represents a structural change that would seriously jeopardize the effectiveness of the program. The development and implementation of a competitive bidding system on a national level is staggering to even contemplate. It would be very expensive to operate and require a massive bureaucracy to administer. It would result in all major decisions being made in Washington by people who have no connection with local communities and their priorities. Local grantees would be plunged into incredible uncertainty and that would inevitably lead to the program being politicized. Every disgruntled defendant in a law suit brought by a Legal Services program is going to pressure LSC bureaucrats to defund the grantee involved.

NOLSW/UAW believes that standards for the award of grants on a competitive basis will be difficult to develop and to implement rationally on a national basis. The most serious problem with competitive bidding is that it will result in undue emphasis being placed on cost, and that will occur regardless of whether or not non-economic standards are also considered. LSC officials in Washington will not be able to discern qualitative differences between applicants, and funding decisions will turn primarily on

cost per case. That will mean disaster for the program, as the experience in the public defender area clearly demonstrates.

In order to put themselves is the best competitive position, bidders are going to claim that they can do more for less money. Current grantees with long term experienced employees will have to cut those employees or place themselves at a competitive disadvantage. As a result the quality of services to the poor will suffer and in the long run the cost-per-case will be even higher as grantees feel the impact of unrealistically low bids. Moreover, a large segment of the employees of grantees come from the local community and, in some cases, are often minorities. Those employees will lose their jobs and benefits and the delivery system will lose important links to the client community.

The staff attorney program is the heart of the contemporary delivery system and is the glue that holds it together. Unlike ten years ago, local Legal Services programs today receive supplemental funding from a variety of sources, both public and private, including IOLTA funds. Those funding sources have generally come into existence in recent years to supplement services provided by grantees with LSC funding. The growth of those funds is a strong testimony to the fact that LSC grants have effectively leveraged other resources on behalf of the poor. Funds from those sources would not likely be available to private practitioners. In fact the very incentive to raise those funds to assist struggling not-for-profit programs will have disappeared.

Staff attorney programs also work very closely with bar associations in operating pro bono programs. The staff program generally has an LSC funded pro bono unit that conducts initial interviews, prepares files, and provides referral services to the pro bono attorney. They also re-assign cases when necessary, prepare statistical reports, and engage in various promotional activities to attract additional participation. Pro bono activity has clearly expanded dramatically in many parts of the country as a result of staff attorney programs working with local bar associations. The support and coordination provided by staff attorney programs are indispensable in maintaining the current level of pro bono activity in this country.

Finally with respect to competitive bidding, the elimination of provisions of the LSC Act that provide for defunding of grantees for cause, with prior notice and a hearing, would be disastrous. Washington bureaucrats will be under tremendous pressure from disgruntled litigants to defund particular grantees precisely because of their effectiveness in representing the poor. Moreover, it is certainly not clear that the cycle of anti-Legal Services hysteria is at an end or that it won't resurrect itself in the near future. Given the nature of the program, and particularly its recent history, it would be ludicrous to eliminate this important safeguard. Notwithstanding this safeguard, any grantee can be defunded under the current provisions of the LSC Act for cause.

Earmarking of funds would represent a dramatic departure

from an essential feature of the Legal Services delivery system, and that is local control and priority setting. The majority of the Boards of Directors of local grantees are attorneys who practice in the community. The client representatives are from the community. Moreover, under the LSC Act, all programs must set priorities based on numerous factors including the views of the client community. To tamper with this important feature of he program is to jeopardize the intimate relationships between various segments of the community that is crucial to the local programs success.

Despite the concerns expressed by Congress over the years LSC continues to harass and abuse grantees. LSC monitors continue to make unreasonable and excessive demands for the production of documents. In fact a United States District Court Judge in Portland, Oregon, on October 6, 1989, in a law suit brought by NOLSW/UAW (National Organization of Legal Services Workers v. Legal Services Corporation, CV No. 89-464-PA) held that LSC's demand for access to confidential personnel files of the employees of local grantees was not "reasonable or necessary" to its statutory duties, and that " ...the evidence that LSC has been hostile toward legal services programs is overwhelming". LSC's response to the judge's order was to promulgate a new grant condition for all programs, other than the Portland program, that subjects grantees to the lose of funding if they do not turn over to LSC confidential personnel information on demand. The grant condition was imposed by the President of the Corporation,

without board approval, and in violation of the requirement to publish for notice and comment.

Incredible as it might sound, the grant condition also requires the establishment of a national personnel file system on all current and some former employees of LSC grantees, the disclosure of those files without notice to the affected employees or their representatives, and a prohibition on collective bargaining with respect to this issue.

To show that he means business, LSC President Terrance Wear, recently notified Middlesex Legal Services, Neighborhood Legal Services in Pittsburgh, and Legal Services of New York (formerly Community Action for Legal Services), that they would lose their funding for failure to comply with the new LSC grant condition. While the LSC Board has been holding the defunding of those programs in abeyance, the threat is still very much alive, and the underlying grant condition remains in effect.

LSC's monitoring and compliance review practices have long been the subject of criticism by the Congress, bar associations, and by grantees and their employees. Consistent with LSC's duties and responsibilities under the LSC Act, the Corporation should be required to conduct its monitoring and compliance functions in a way that respects the privacy rights of the employees of local grantees, does not interfere with the duty of grantees and their employees to bargain in good faith, and does not have the effect of micro-managing local programs.

Finally, even though the timekeeping requirements proposed

by the "reformist" would not result in a fundamental structural change, it would nevertheless have a serious negative impact on grantees. It would be extremely costly to implement, and would subject attorneys and paralegals, already overburdened with excessive caseloads, to an additional significant burden. Moreover, there is no practical reason to impose a system that requires contemporaneous recording of all time spent on cases or other matters. To the extent that time records might be needed to distinguish between the use of LSC and non-LSC funds a less extensive system might be appropriate.

Mr. FRANK. Go ahead, Mr. Saucedo.

Mr. SAUCEDO. Thank you, Mr. Chairman and members of the subcommittee.

I am Valeriano Saucedo. I have been in Legal Services for 14 years; the last 10 with California Rural Legal Assistance. California Rural Legal Assistance has a proud tradition of representation of the rural poor for 25 years. I am the director of CLA's Migrant Farmworker Project in the Fresno office.

Today I am going to give you an overview of the kinds of services that we provide and also share some comments about the McCollum-Stenholm provisions regarding agriculture.

Before doing that, I would like to share my special affinity with migrant farmworkers with you.

Mr. FRANK. I don't think that will be necessary, Mr. Saucedo. We like to keep the personal to a minimum because we have a time problem, so let's get right to the organizational.

Mr. SAUCEDO. Thank you.

My father right now is working in a grape field in California, and before coming here I spoke with him. He was very proud about the fact that the son of a migrant farmworker, who went to Stanford Law School, and became a lawyer, had the opportunity to present the views of migrant farmworkers on this very important issue.

The living and working conditions have not changed for farmworkers since the time that we were farmworkers. I can remember that we lived in housing that was in deplorable condition, that oftentimes we were not paid our wages, and that we were exposed to pesticides and, in fact, sometimes we were actually poisoned.

Those conditions, unfortunately, have not changed for many, many farmworkers throughout this Nation.

Migrant Legal Services has been extraordinarily successful in their cases. Congressman Berman talked our success rate, and that is in our testimony as well.

Let me focus on a couple of conditions that I think are important and relevant to McCollum-Stenholm. Migrant Legal Services is unlike any of the other Legal Services because we deal with a special client population. There are special barriers to access. One is language. The vast majority of our clients do not speak English; they speak other languages. They also live in isolated rural areas and in labor camps. There is high mobility and the temporary nature of the residents and cultural differences many times leads to unfamiliarity and distrust of all persons, including Legal Services lawyers.

There is a great deal of dependence on employers, on raiteros, the people that transport migrant farmworkers. Oftentimes, they transport workers in vehicles that are not safe.

An attempt has been made to create the image that Migrant Legal Services attorneys are out to "get" agriculture employers. That is far from the truth. The cases that we file are meritorious and are certainly not frivolous. Our record of success in those cases demonstrates that.

The simple fact is that there are some employers who comply with the law and there are some who do not. Frankly, the ones who do not comply with the requirements of the law hurt the

entire industry. Usually they are the ones who fail to pay the minimum wage; hire unscrupulous farm labor contractors; or house farmworkers in deplorable conditions. Those are the persons that are the subject of our lawsuits.

There's also a suggestion that somehow we don't play by the same rules as other competent lawyers. The fact is that we are dedicated and highly professional lawyers and we play by the same substantive and procedural rules as other lawyers.

Getting to McCollum-Stenholm, the proposed prohibition against solicitation in fact only creates another barrier to access, which will prevent farmworkers from gaining legal assistance—necessary legal assistance. Denial of such access is being done under the guise of preventing solicitation.

As mentioned before, migrant farmworkers are highly dependent on their crew leaders, on the raiteros, and fallulqueros, the people who sell them lunches in the fields at exorbitant prices. Quite simply, the fact is that these persons who are part of the problem, would not bring the workers they are exploiting to Legal Services' offices.

To surmount this access barriers, our programs go to farm labor camps, usually in the evenings, and inform farmworkers about services that are available to them. We answer their questions in Spanish and English. We distribute education materials on the right to minimum wage, field sanitation and such basics as fresh drinking water, the availability of food stamps, health services, and other such benefits.

One of the unspoken goals of this prohibition is to separate farmworkers from their lawyers. That is not a legitimate goal, and, it should not in any way be endorsed by this committee.

Another element of McCollum-Stenholm, under the guise of expediting the resolution of disputes, would require farmworkers to exhaust any and all administrative remedies before they could file suit.

Upon closer analysis, it's just another way of handicapping the rights of farmworkers and slowing down, or entirely preventing them from exercising their rights. These precedural rules restrict the options for their lawyers. It completely ignores the fact that Federal law, and the law of most States, already requires exhaustion of administrative remedies where there is an effective administrative remedy.

On the question of alternate dispute resolution, both this requirement and the other one invite delay and the potential for abuse and prejudice. Curiously, this provision would prohibit filing a lawsuit or otherwise pursuing litigation against a farmer or grower as long as the other mediation proceedings were under way, but does not address whether it would toll the running of the statute of limitations.

Another fiction that has been created is that farmworkers must be identified to growers or crew leaders regardless of the circumstances. We know that violence is all too common against farmworkers; so is retaliation for the mere seeking of legal help.

Sometimes we have to make decisions about under what circumstances it is prudent and professionally responsible to disclose the name of a client; that is a judgment that has to be made on a case-

by-case basis. Federal law already permits that, especially in the filing of complaints.

The solution as proposed would be to basically yank the lawyers from their clients and also to try through the back door to change some very fundamental rights, including rights under AWPA.

We do not need to change the rules for farmworkers and single them out for special treatment and, in fact, adverse treatment.

Interestingly today, and at other times, I think that you have heard from a very powerful lobby, the Ag lobby. But interestingly, you have not heard from the other side—the farmworkers. Farmworkers cannot come to this committee and explain in detail the kind of suffering that they experience in the fields.

The so-called reforms are nothing more than a proposed separate and unequal system of justice for farmworkers under the guise of reform.

We are at a very important juncture in the history of farmworker rights. Two years ago, I became a migrant once again. In celebration of the 200th anniversary of the signing of the Constitution, I travelled to Philadelphia and was struck by Ben Franklin's remarks upon the conclusion of the Constitutional Convention.

At the beginning of the Convention, Ben Franklin noticed a carved sun on the headrest of General Washington's chair and wondered whether it was a setting or a rising sun for the fledgling nation. But upon the signing of the Constitution he was sure that it was a rising and not a setting sun.

I ask you, let it not be said years from now that we permitted the sun to set on the rights of farmworkers in the guise of reform.

Thank you.

Mr. FRANK. Thank you, Mr. Saucedo.

[The prepared statement of Mr. Saucedo follows:]

PREPARED STATEMENT OF VALERIANO SAUCEDO, ON BEHALF OF THE CALIFORNIA RURAL LEGAL ASSISTANCE

Mr. Chair and Members of the Subcommittee:

Thank you for this opportunity to testify before you today. I am Valeriano Saucedo, director of the Migrant Farmworker Project for California Rural Legal Assistance. I have worked in legal services for fourteen years --- the last ten with California Rural Legal Assistance. Before addressing our concerns with the "reforms" affecting the rights of agricultural workers advanced by Congressmen Stenholm and McCollum, I want to share with you my special affinity with migrant farmworkers.

I was born in Tornillo, Texas and grew up as a migrant farmworker. During my early childhood, my family traveled from west Texas to central California and back. We picked oranges, cherries, apricots, pears, and prunes; our specialty was tree crops. In the mid-1960's we moved to central California and from there we migrated to northern California, Oregon and Washington.

The conditions that we faced were intolerable and, at times, inhumane. I will never forget the deplorable conditions which we encountered. If we were fortunate enough to find housing, it was usually in complete disrepair. When there was no housing we made temporary shelters out of pallets, or fruit boxes. Other times we lived in barns and tool sheds. Where there was nothing else available, we lived in our car. There were no toilets or drinking water in the fields. We were exposed to pesticides and, on several occasions, we were actually poisoned.

Most of the work that we did was done by piece rate and everyone worked, even my little brothers and sisters. Although there were seven of us children plus my mother and father, as a group, seldom did we earn the minimum wage.

If we had problems with poor housing or if we were underpaid or not paid at all, we did not have any recourse. At that time, we couldn't turn to anyone for help because we lived in isolated labor camps and many times when we migrated to a community, we did not know anyone other than perhaps the farm labor contractor or grower who had recruited us. Oftentimes, these were the same persons who were the source of our problems.

The living and working conditions which we endured twenty years ago have not changed dramatically for farmworkers. Many farmworkers still live in labor camps which are filthy and unfit for human habitation. Farmworkers are often recruited to travel far from their homes, promised certain wages and working conditions, only to find upon their arrival broken promises and few, if any, choices. We find that minimum wages are not being paid as required by the law and that farmworkers are still being exposed to dangerous pesticides. Farmworkers are being transported to work in unsafe vehicles and, in several instances, farmworkers have actually been injured or killed. (See e.g. Adams Fruit Co. v. Barrett 110 S. Ct. 1384 (March 21, 1990) farmworkers who were injured while being transported in an unsafe vehicle obtained relief under AWPA). These are not descriptions of living and working conditions from our nation's distant past but descriptions

of conditions which are going on today and are still all too commonplace.

Migrant farmworkers are a client population unlike any other that legal services represents primarily because of existing special barriers to necessary legal services. These barriers include mobility, language, lack of familiarity with the legal system, fear and distrust of the legal system, rural isolation usually exacerbated by living in hard-to-reach labor camps, and dependence on farm labor contractors, "raiteros" and "falluqueros." In response to the special needs of migrant farmworkers, migrant legal services was created to give farmworkers better access to the legal system.

Much of the litigation conducted by migrant legal services arises under the Migrant and Seasonal Agricultural Worker Protection Act, commonly known as "AWPA". This federal statute, passed in 1982 as a compromise between farmworker and agricultural organizations, including the American Farm Bureau Federation, grants farmworkers certain minimum protections in their employment relationship with growers and crew leaders. AWPA requires certain minimum housing and transportation standards and requires an employer to disclose the terms and conditions of employment when recruiting farmworkers. It also provides for the reduction of any damage award if a court finds that a farmworker did not attempt good faith negotiations to settle his claims prior to filing suit --- a requirement which was included at the insistence of

agricultural groups involved in negotiating AWPA. Finally, AWPA allows farmworkers to file suit for AWPA violations without the necessity of exhausting administrative remedies --- an option which has proven necessary to the protection of farmworkers' rights under the statute because AWPA's administrative remedies are incomplete and inadequate in that they do not allow for normal relief such as money damages or injunctive relief.

Any lawyer would be proud of the record of migrant legal services in AWPA cases. Of the twenty-nine (29) reported AWPA cases, migrant legal services has won 26. This success rate underscores the quality of legal work done by migrant program staff and their professionalism and dedication.

Critics of migrant legal services have sought to create an image that migrant legal services attorneys are out to "get" agricultural employers and that the cases they file are frivolous. The record clearly does not support such allegations. The simple fact is that there are employers who comply with the law and there are others who do not. The ones who fail to pay minimum wage, who hire unscrupulous farm labor contractors, who house farmworkers in deplorable conditions, or who transport farmworkers in unsafe vehicles are being sued. They are also the ones who hurt law-abiding growers and undermine the agricultural industry. The record shows that a very small percentage of agricultural employers have been sued and, because those employers were operating outside the law, they lost.

Mr. Stenholm and Mr. McCollum, siding with a small but vocal segment of the agricultural industry are now asking for special rules which will make it more difficult to protect the rights of farmworkers. Unlike our critics, migrant legal services attorneys do not ask for special rules or treatment under the law. We simply play by the same substantive and procedural rules as every other lawyer. If the law requires exhaustion of administrative remedies, we, like every other lawyer, exhaust those remedies. If the court requires mediation, we mediate. If the rules of civil procedure require sworn affidavits, we file sworn affidavits. If the court hearing our case does not grant us leave to file a John Doe complaint under Rule 10 of the Federal Rules of Civil Procedure, we file in the name of the farmworker.

We are highly professional, dedicated lawyers. Like every other lawyer, we only ask for a level playing field and to not be handicapped by special rules directed at limiting our ability to seek justice on behalf of our farmworker clients.

Let me now turn my attention to the agricultural provisions in Congressmen Stenholm and McCollum's "reform" proposal and demonstrate how they would handicap not only the rights of farmworkers but also our ability to effectively represent farmworkers.

A. <u>The proposed prohibition against "solicitation" creates a barrier which prevents farmworkers from gaining access to legal assistance under the guise of preventing solicitation</u>.

One of the problems farmworkers have is that they are not

aware of the protections given them by law. An important function of legal services is to inform poor people, including farmworkers, of their rights.

As mentioned before, migrant farmworkers generally live in isolated rural areas and are highly dependent upon their crewleader for most things including transportation. Quite simply, crewleaders, who are often part of the problem, do not and would not bring the workers they are exploiting to a legal services office for assistance.

To surmount this access barrier, migrant legal services offices conduct farmworker outreach --- programs go to farm labor camps, usually in the evenings after working hours, and inform farmworkers about the services available to them from legal services. Accordingly, programs answer questions, distribute educational material in English, Spanish and other languages on the right to minimum wage, field sanitation and fresh drinking water, and the availability of food stamps, health services and other benefits.

Recently, a legal services lawyer in West Virginia told me about an incident which illustrates the benefit of farmworker outreach. During an outreach visit to a labor camp 70 miles from his office, he met farmworkers who had just come from South Carolina. While in South Carolina, they were housed in a labor camp they described as being surrounded with a barbed wire fence. The camp was miles from the nearest town. While at that camp, they often did not get any money on pay day after the crewleader made

what appear to be illegal deductions for purchases at a company store that he operated --- an activity that was outlawed by Congress 30 years ago. Although the farmworkers had a sense that they were being treated wrongly, they did not know about legal services in South Carolina.

When they got to West Virginia, they did not know about legal services there, either, until the legal services attorney met them on a farmworker outreach visit. Now, those farmworkers are being represented. Without such outreach efforts, the farmworkers would never have obtained legal assistance.

The Stenholm/McCollum amendment prohibiting "solicitation" would, in fact, prevent such outreach efforts. One of the unspoken goals, and certainly an effect, of the prohibition against "solicitation" is to prevent farmworkers from gaining access to legal services and to insulate agricultural employers. This is not a legitimate goal and should not be in any way endorsed by this committee.

B. Under the guise of expediting the resolution of disputes, another proposed amendment would require farmworkers to exhaust any and all administrative remedies before they could file suit.

This amendment has been touted as a means of resolving disputes economically and expeditiously for all of the parties. Upon closer analysis, it is just another way of handicapping the rights of farmworkers by slowing down or entirely preventing their litigation and restricting the options for their attorneys.

This amendment would require a legal services attorney--but not a private attorney--to jump through four hoops before he could even pick up a telephone to call an agricultural employer to attempt to resolve even the simplest of problems.

First, the Stenholm/McCollum provisions on dispute resolution require exhaustion of "any and all" administrative remedies, whether or not they can result in a final resolution of a client's problem. It completely ignores the fact that federal law --- and the law of most states --- already requires exhaustion of administrative remedies where there is an effective administrative remedy. This measure imposes upon farmworkers represented by legal services attorneys a burden which not only does not currently exist for any other litigants but, more importantly, would not be imposed upon any other group of litigants.

Contrary to the impression given by agricultural employers, there are no effective administrative remedies for the most common violations of the minimum wage law and AWPA. As mentioned before, when Congress enacted AWPA, it explicitly decreed that farmworkers need not exhaust administrative remedies before filing suit under the AWPA. It did this because experience during the prior 20 years had shown the U.S. Department of Labor (DOL) was either unwilling or unable to devote the resources necessary to enforce the laws and protect farmworkers. DOL now has less than one full-time person per state to enforce all provisions of AWPA, the minimum wage law, and field sanitation standards for farmworkers. With this history, Congress determined the best way to prevent abuse of farmworkers

was to give them the right to file suit and protect themselves. A recent article in The Agricultural Economics and Law Journal suggests that AWPA has achieved its purpose of bringing many employers into compliance with the law.

Moreover, although DOL does investigate violations of AWPA, it does not obtain any compensation for farmworkers injured by the violations. DOL can only assess civil money penalties for violations, and those penalties are paid to the government, not to farmworkers. DOL also investigates minimum wage complaints, but it often settles the complaints for far less than the full amount owed to workers because it lacks the resources to fully enforce the law.

Second, before a legal services attorney can contact an agricultural employer to try to informally resolve a complaint, the Stenholm/McCollum amendment would require the use of "alternative dispute mechanisms." This, too, is wholly unnecessary. Under AWPA, when a court sets statutory damages to be awarded to a farmworker, it can consider efforts made to resolve the case without litigation. 29 U.S.C. § 1854(c)(2). This requires lawyers for farmworkers to attempt good faith negotiations or risk reduction of statutory damages. The record of reported cases clearly shows that there is no case where damages have been reduced because a legal services lawyer did not attempt to negotiate a settlement. It is noteworthy, however, that damages have been increased because a grower refused to negotiate. Frenel v. Freezeland Orchard, Co., 108 Lab.Cas. (CCH) ¶ 35,016 (E.D.Va. 1987).

Another defect in this provision is that it would require use of "alternative dispute resolution" mechanisms without regard to what those mechanisms would be or whether their use would prejudice a farmworker's rights or claims. Both this requirement and the exhaustion of administrative remedies invite delay and the potential for abuse. Curiously, this provision would prohibit filing a suit or otherwise pursuing litigation against a farmer or grower as long as the other proceedings were under way, but does not address whether it would toll the running of the statute of limitations.

The third hoop presented by the proposed amendment is the requirement that the farmworker client must be identified to the grower or crewleader regardless of the circumstances. Violence against farmworkers is all too common. So is retaliation for seeking help from legal services. See, Monville v. Williams, 107 Lab.Cas. (CCH) ¶ 34,979 (D.Md. 1987) (farmworkers beaten after they complained about wages and fired after they consulted with a legal services attorney in Maryland); U.S. v. Booker, 655 F.2d 562 (4th Cir. 1981) (crewleader convicted of holding workers as slaves through threats of serious injury or death); U.S. v. Warren, 772 F.2d 827 (11th Cir. 1985) (same).

Rule 10 of the Federal Rules of Civil Procedure already requires that court documents identify the complaining party. However, caselaw --- unlike the proposed amendment --- recognizes an exception. Where protection of the identity of the plaintiff is necessary to safeguard against harassment or violent retaliation,

federal caselaw permits John Doe complaints upon a proper showing to the court. Doe v. Stegal, 653 F.2d 180 (5th Cir. 1981). The proposed amendment would deny to indigent farmworkers this protection which is available to all other litigants with civil claims and which, if imposed, may result in death or bodily injury to farmworkers.

The fourth hoop required by the proposed amendment is that the legal services lawyer obtain from the client a detailed affidavit setting out all the facts of the client's claim. This must be done before an attempt can be made to contact the farmer to resolve even the simplest matter. Again, the requirement is clearly designed to discourage farmworkers from getting legal help, and to deprive legal services attorneys of time to provide it.

Further, if suit is filed, the affidavit would have to be attached to the complaint. This is not required of any other plaintiff in a civil suit for damages. The Stenholm/McCollum proposal would effectively amend --- for farmworkers only --- the Federal Rules of Civil Procedure. The requirement of verified affidavits with complaints was abolished over fifteen years ago, after a thorough study and revision of the Federal Rules. There is no reason to reimpose it upon a small group of working poor people who are simply attempting to enforce their rights under the law.

The so-called reforms would create nothing less than a separate, and unequal system of justice for farmworkers. Second class justice for farmworkers --- one of the nation's most oppressed and exploited groups --- should not under any

circumstances be endorsed by this committee.

In the final analysis, the agricultural provisions are not reforms. It reminds me of another "reform" which I experienced when I was growing up in Texas. On my birth certificate it says that I am Caucasian, although I am of Mexican descent. But after the Brown decision in the 50's, schools in my community were integrated by allowing black school children to attend school with Mexican children because we were "Caucasians". However, there was still a separate "white" school which had no Mexican or Black students. Although the schools were still in fact segregated, there was compliance with the mandate of integration. Here, again, under the guise of reform, a second class system is being created for farmworkers.

Two years ago I became a migrant once again. In celebration of the 200th anniversary of the signing of the Constitution, I traveled to Philadelphia and I was struck by Ben Franklin's remarks upon the conclusion of the Constitutional Convention.

At the beginning of the Convention, Ben Franklin observed a carved sun on the headrest of General Washington's chair and wondered whether it was a setting or a rising sun. But upon the signing of the Constitution he was sure that it was a rising and not a setting sun for the fledgling nation. So, let it not be said years from now that we permitted the sun to set on the rights of farmworkers in the guise of reform.

Thank you for the opportunity to address you today.

Mr. FRANK. We've been called to a vote. Thank you. The testimony was very much to the point and concise, and I appreciate that.

We will be in a brief recess.

[Recess.]

Mr. FRANK. The committee will reconvene.

I apologize, it was a previous question followed by a vote on the rules so I had to wait.

We had just heard from Mr. Saucedo and now we are going to hear from Mary Lee Hall. Please go forward, Ms. Hall.

STATEMENT OF MARY LEE HALL, DIRECTOR, ON BEHALF OF THE FARMWORKERS LEGAL SERVICES OF NORTH CAROLINA

Ms. HALL. Thank you. Before I start, Mr. Chair, we would like to hold the record open so that we——

Mr. FRANK. Yes, we'll hold the record open; go ahead.

Ms. HALL. Thank you.

My name is Mary Lee Hall and I am the Director of Farmworkers Legal Services of North Carolina, which is a part of Legal Services of North Carolina.

Farmworkers Legal Services of North Carolina is currently engaged in a dialog with the North Carolina Pickle Growers Association.

Mr. FRANK. Who growers?

Ms. HALL. Pickle.

Mr. FRANK. Pickle Growers.

Ms. HALL. I know that sounds odd but that's what they call themselves, and you probably thought pickles were processed and not grown—it refers to the small cucumbers that eventually become pickles.

I think that our experience with this project is relevant to the alternative dispute resolution requirement in the McCollum-Stenholm package that's before you.

We came to be involved in this process because in 1989 we were engaged in our State legislature in negotiating a bill concerning migrant labor camps with a number of other groups, and the lead grower group in that matter was the North Carolina Pickle Growers Association.

North Carolina is a State which has a large migrant work force and 95 percent of our clients live in employer-controlled housing and labor camps.

We had a situation which we had four different agencies who were permitting camps with differing standards and our compromise bill came out—consolidated all of this in the North Carolina Department of Labor with one set of standards which complied with the OSHA standards, which are applicable under the Migrant and Seasonal Agriculture Worker Protection Act, so that a grower receiving certification from the North Carolina Department of Labor, that certification would be sufficient to meet his responsibilities under AWPA as having housing which was certified as in compliance with all applicable State and Federal standards.

After this bill passed in the fall, the attorney for the Pickle Growers contacted me and asked, since we had been successful in that process, if we would like to sit down and talk to some of their

growers. I was delighted to do so. We met a couple of times and sort of planned what we would do. We had a meeting in March with a group of pickle growers—I think about seven. It's an interesting industry. There are very large growers, very small growers—a handful of processors, and there were representatives of all of these folks at the first meeting—and myself and one other person from our staff.

We didn't do this in a vacuum. There has been a similar project going on for a number of years now in Pennsylvania. And before we started this, I talked at some length with the person who has been the mediator on that project, who indicated to me that he thought one of the most useful things as apart from the individual dispute resolution process, was just what he called macromediation, or sitting down and discussing how we came to to come to the table; because he thought that Migrant Legal Services folks and farmers tend to have very different world views—and the sharing of those views was very useful for the eventual success of the project.

So that's what we did in March, and we're going to meet again in June.

Mr. FRANK. March of this year?

Ms. HALL. Of this year.

As I indicated in my written testimony, I think it was useful for a number of reasons. I think it was useful in that we heard them; we got to hear what they wanted to tell us directly. It was useful because we were able to sort of say, well, maybe there's some things that we agree about, that we can work on together, like increased farm safety, independent housing for farmworkers.

I think it was useful for all of us because we were able to sort of debunk some of the myths about who we are and what we do.

We are still a long ways. We agreed to continue this process and to see if we can find some sort of alternative dispute resolution mechanism that we can agree upon.

We don't have much notion of what it would be. I am sure I have some ideas about what I would like; I'm sure they have some ideas. But what we have agreed to do is engage in the process.

I'd like to point out that there's nothing that prohibits any other grower group in the country from doing the same thing right now. I am quite sure that my colleagues across the country would be quite willing to respond to any invitation to sit down and discuss such a procedure with other folks.

I have to say, though, that voluntariness is a big part of this process. I feel comfortable with this particular process. I would not feel comfortable being forced to engage in a process with some other grower groups in North Carolina—groups that have continually, in whatever forum that's been available to them—attacked our program and attacked the basis of representation of our clients.

Mr. Babb, who is the attorney for the Pickle Growers, has long been a supporter of Legal Services in North Carolina and of Legal Services in general, and has demonstrated that support, both in the State legislature and in his bar activities. I feel comfortable about that. I don't feel it's a subterfuge for the destruction of Migrant Legal Services.

I think that the McCollum-Stenholm provisions that are being proposed are different. I think it's another hoop that farmworkers would have to jump through. As I have detailed in my testimony, farmworkers already face a lot of barriers in getting access to the courts.

In North Carolina, almost everyone lives in a migrant labor camp, under employer scrutiny. People are routinely retaliated against for complaining. Every season, for such simple matters as collecting wages for people—the employer refusing to pay wages, we have clients threatened. In some cases the threats are actually carried through.

We have good reasons, I think, for not wanting to delay any further the access of our clients to the courts. And quite simply, we believe that farmworkers should be treated like everyone else in terms of their access to the judicial system.

Mr. FRANK. Thank you. Thank you both.

[The prepared statement of Ms. Hall follows:]

PREPARED STATEMENT OF MARY LEE HALL, ON BEHALF OF THE FARMWORKERS LEGAL SERVICES OF NORTH CAROLINA

TESTIMONY OF MARY LEE HALL,
FARMWORKERS LEGAL SERVICES OF NORTH CAROLINA

Mr. Chair and members of the subcommittee, I appreciate this opportunity to appear before you today and to tell you about some of the things we are doing in North Carolina to improve communication between our program and agricultural employers. My name is Mary Lee Hall and I am the director of Farmworkers Legal Services of North Carolina, which is a component of Legal Services of North Carolina. I have been with the program since April of 1988. Before that, I did similar work in Florida for 11 years.

Farmworkers Legal Services of North Carolina is a three lawyer program, serving migrant farmworkers and their families in North Carolina. Migrant farmworkers work in almost every area of our state, from apples and Christmas trees in the mountains, to tobacco and white potatoes on the coast. Most migrant farmworkers are employed in the tobacco, sweet potato, cucumber and apple harvests.

Our experiences have relevance to the matters in the Stenholm-McCollum proposal which bear the misleading title of "Procedural Safeguards for Agricultural Litigation", and particularly to the prohibition against litigation or against settlement negotiations with an agricultural employer unless alternative dispute resolution has been utilized. This year, we embarked on what we hope will be a series of discussions with the North Carolina Pickle Growers Association. It is our hope if both we and the member pickle cucumber growers decide it would be

in our best interest, that the result of our discussions will be some alternative dispute resolution procedure which meets both our needs.

I would like to relate how we came to be involved in this process. The vast majority, probably more than 95%, of the migrant farmworkers in North Carolina, as well as a large proportion of seasonal farmworkers, live in employer-controlled housing, either labor camps or tenant houses. Our program had been involved in a series of cases against the various federal and state governmental agencies charged with the inspection and issuance of permits for labor camps for negligent issuance of permits for camps not meeting the standards. No less than four different agencies, the U.S. Department of Labor, the North Carolina Department of Labor, the North Carolina Employment Security Commission, and the North Carolina Division of Health (through each of the 100 county health departments) were involved in inspecting and issuing permits for labor camps. As a result of a pending class action, the health departments were eager to get out of the inspection business, and grower groups decided it would be in their interest to have a more uniform inspection system, with standards which met their responsibilities under the federal law.

In early 1989, Farmworkers Legal Services, the agencies, and various grower groups sat down together to attempt to negotiate a new law which would set uniform standards for farmworker housing meeting a housing provider's obligations under the Migrant and Seasonal Agricultural Worker Protection Act,

centralize enforcement in the North Carolina Department of Labor, and provide a sufficient budget for that agency to meet its mandate under the statute. The grower group which took the lead in the negotiation process was the North Carolina Pickle Growers Association. Their attorney, Henry Babb, a former president of the North Carolina Trial Lawyers Association and well known in the General Assembly, was instrumental in helping the parties to negotiate a bill. The negotiated bill passed the General Assembly overwhelmingly in the early summer. Many members of the legislature expressed pleasure and surprise that historical adversaries had been able to reach agreement; one even alluded to the prophecy of Isaiah, that the lion shall lie down with the lamb, having been fulfilled in this process.

In the fall of 1989, Mr. Babb contacted me, suggesting that it might be useful to meet with some of his clients and come to a better understanding with them. I suggested to him that we enlarge the process and explore whether we could agree on some sort of alternative dispute resolution system for individual worker complaints. I did this with the express approval and support of the Board of Directors of Farmworkers Legal Services; a number of our board members were acquainted with Mr. Babb and felt that he had always been very supportive of legal services and that this effort would be worthwhile.

We have now had two meetings with Mr. Babb, and one meeting with a committee of 8 or 9 pickle cucumber growers and processor representatives. At this point we are engaged in dialogue; we have listened to the growers' concerns about their

future workforce and their responsibilities as agricultural employers. We have expressed our view that many of the problems our clients face result from their historical exclusion from the protections other worker have enjoyed since the New Deal, that from our perspective part of the solution is that farmworkers must be able to have the same expectations as other workers about their jobs-- that they'll actually receive compensation for their work, that the taxes deducted from their pay will actually be reported and paid in, that they'll be able to draw unemployment if they're laid off, workers compensation if they're injured, and that with hard work they can make actually make enough to support themselves and their families. We also discussed the desire of our clients for more steady work.

We are going forward with our dialogue. Our next meeting with this group is scheduled for June. In additon to discussing our differences, we are planning to explore other areas in which we might have a common interest, possibly better farmworker housing independent of employers or increased farm safety. We have agreed to see if we can work towards some sort of alternative dispute resolution procedure.

Farmworkers Legal Services of North Carolina and the North Carolina Pickle Growers Association currently have a joint grant proposal pending before the National Institute for Dispute Resolution for funding to provide a mediator to help us through our dialogue and for mediators for the individual dispute resolution procedure. The Private Adjudication Center at Duke University has agreed to be the recipent and is engaged in the

processe of searching for suitable impartial persone to be mediatore, as well as for additional funding for the project.

Our dialogue did not happen in a vacuum. In planning our course , we were instructed by a pilot project in Penneylvania. In our discussions with the mediator in that project, we learned that he felt that the most useful part of that process was the discussions that took place before the dispute reeolution procedure was agreed upon. In his view, agricultural employers and farmworkers representatives come to the table with markedly different world views; he felt that the procese of exploring those differences was very worthwhile.

Our firet meeting certainly proved his point. At thie meeting, seven pickle growers or processor representatives, their attorney Mr. Babb, and two Farmworkers Legal Services staff were in attendance. I must admit that I approached the meeting with some trepidation, both because of the ratio and because I felt that all our rolee would be less compromised if we had a neutral facilitator for the discussion. Nonetheless, I went. I learned that a number of the growers had also approached the meeting cautiously and that some of their peers, who weren't present, had expressed doubts about their sanity becauee they had decided to attend.

We had an interesting, and eeemingly productive discuesion about their concerns about our program, or more accurately, their concerne about the myths about our program. We discussed why we visit workers in labor camps, why we go in the evenings or weekend afternoons, what we talk to workers about,

what they talk to us about, how people contact us for help. I believe it was enlightening to the pickle growers and processor representatives and that at the conclusion of the discussion, all those in attendance understood that we visit labor camps to talk to workers, to let them know about our services, to distribute literature about the law as it applies to them, and, generally, just to let them know how they can get in touch with us. I am convinced that a number of those present had not made the connection that we went in the evenings to avoid interference with the workday, and that visiting workers in the camps was one of the few ways we had to let the workers know about our availability. It was also my impression that it had honestly not occurred to a number of the participants that a lot of the information we give to workers concerns immigration, foodstamps, and other matters peripheral to the employment relationship. In fact, it is extremely rare that anyone approaches us about an employment related problem while we are visiting a camp. Clients tend to approach us with such problems either by coming to our office or calling us on the phone.

The growers at the meeting emphasized that they wanted to hear of any problems right away so that they could correct them. We assured them that is our practice. One of the growers present corroborated that in fact we had contacted him immediately last fall when one of his workers was threatened by the contractor after talking with our staff. One grower asked if the farmers could always be present to hear what we said to the workers. His attorney pointed out to him that we visit the camps in the role

of lawyers, and that he wouldn't want Farmworkers Legal Services to be present everytime they had a conference , so we could hear what was said. At the conclusion of our first meeting, I believe that we had started down the road towards a better understanding of each other.

Our experiences with the Pickle Growers Association, albeit limited, show that any alternative dispute mechanism must be voluntary. Our project has a chance because both sides feel they have something to gain by the process. As we said in our joint application to NIDR:

> "Both sides have dissatisfactions with the alternatives when AWPA damages suits are involved. From the workers' viewpoint, if litigation is required, the dispute may take years to resolve. Growers, on the other hand, feel that they must settle cases because of the relatively high cost of litigation. Thus, while most disputes are settled, external circumstances, such as the cost of litigation, the length of time inherent in litigation, the mobility of the workers and language barriers, tend to be the motivating factors for settlement and the parties rarely come to a better understanding of each other. Each side tends to leave the settlement feeling coerced by circumstances beyond their control."

Because the parties have come to our process totally voluntarily, we are open to the process. If I had no choice but to engage in this process, the Pickle Growers would have an enormous advantage and I would, quite naturally, be much more closed to the possibilities of dialogue. I also know that I am comfortable that this project with the Pickle Growers is not a subterfuge for the destruction of legal services for migrant farmworkers; I could not say the same for all other grower groups in North Carolina. It is clear to me that the provisions

of Stenholm-McCollum regarding agricultural suits are not in support of equal justice for migrant farmworkers, and I would be extremely reluctant to enter into any alternative dispute resolution process with those whom I had reason to believe were pushing for alternative dispute resolution simply as a way to delay or deny justice to my clients.

I am aware of two other farmworker legal services programs who are involved in alternative dispute resolution. One is the Pennsylvania program I mentioned earlier; the other is the West Virginia program. In both instances, the process was entered into voluntarily by both the legal services program and the agricultural employers. There is nothing which prohibits grower groups interested in meeting with farmworkers' legal services advocates from doing so at present. I know that my colleagues across the country would respond to an invitation to do so. It is entirely another matter to effectively bar a migrant farmworker from access to the courts simply because he or she has a problem with the employer and is represented by a legal services program. That is the impact of this proposal; if the proponents are truly interested in resolving farmworker-farmer problems, not suppressing worker complaints, they are free to initiate a process with any farmworker legal services program right now.

There is implicit in the Stenhom/McCollum proposals the notion that farmworker legal services programs are always confrontational and never willing to discuss disputes short of litigation. Nothing could be further from the truth. I believe

the problems our oliente have and the way we handle them in North Carolina are fairly representative of the situation in other programs. The typical client who contacts our office has been recruited under false promises, brought to North Carolina and placed in employer controlled houeing which in some basic way fails to meet the standards (no running water, no hot water, no heat in cold weather, mattressee on the floor), been paid in cash with no pay receipt or with a receipt which does not identify the deductions taken from his or her pay, had Social Security taxes deducted from his or her pay but neither reported nor remitted to the government, and otherwise had large, unauthorized, amounte deducted from his or her pay, reducing the pay below the minimum wage. Some of our clients only want to get their wages from the laet period. Others choose to seek their unpaid minimum wage for the entire period of employment and damages under the Migrant and Seasonal Agricultural Worker Protection Act.

As you know, the Migrant and Seasonal Agricultural Worker Protection Act, or AWPA, provides that any aggrieved person may bring a civil action for actual damages or up to $500 statutory damages per violation of the Act. It also provides that the court may take settlement efforts into account in awarding damages.

When a client decides to pursue only the wage claim, it ie our practice to try to deal with it ae expeditiously as possible, normally by calling the agricultural employer to get the wages immediately. Usually, the client has just left the employer and needs the money to get to the next job. If the

problem occurred in the past, of course, there is not usually the same need for immediacy. When a client wants to pursue claims under the minimum wage law and AWPA, after a preliminary investigation, we normally send a letter to the grower notifying the grower of the claims and asking the grower to contact us about them. A number of growers have been perturbed by the receipt of these letters, and they have been the source of much controversy. In fact, after I came to North Carolina in 1988, I encouraged the other attorneys to use a much shorter initial letter, which simply invited an employer to contact us about a problem. The attorneys had been using a letter which detailed all the claims, and which, if there was a fear of retaliation, did not disclose the client's name. The State Bar of North Carolina has specifically approved of this latter practice as a valid exercise of an attorney's discretion in the best interest of his client; the opinion is not limited to legal services attorneys. In fact, every season, several of our clients are threatened with bodily harm or fired or otherwise retaliated against for consulting us.

In our pilot project with the North Carolina Pickle Growers Association, we have a forum in which to discuss our practice regarding letters to employers about AWPA and minimum wage claims. The topic arose at the meeting I alluded to earlier. Although only one of the growers present, as far as I know, had ever received such a letter from us, they all reacted to the mention of the letters as if they had each received a dozen. Several of the growers asked why we couldn't just call

them on tha phone if there was a problem. In fact it is our policy to call them when there is an immediate problem that they can resolve right away, such as getting a worker's pay, or a threat against a workar. Somatimes, though, it has been our experience that it is virtually impossible to contact a grower in a timely mannner on the phone. For axample, in the fall of 1989, during a camp visit a worker requested our assistanca in getting his alien registration number so he could apply for a replacement lawful temporary resident card. He had the card when he started his employment, but had lost it. We knew that the grower, who had checked the card pursuant to the employar sanctions provisions of the Immigration Reform and Control Act, should hava the number. The worker needed the number in order to get a new card, but could not successfully communicata this with the grower because of the language barrier and his work and housing being some distance from the grower. It took four days before we were able to reach the grower, because the only phone was his home phone, and in tha harvest season, he was rarely there except very late in the evening. After I explained this, the pickle growere at our meeting realizad that, unless they had an office, they were difficult to reach during the day, and that we were working out of our offices in the evening visiting camps. At the end of our discussion, letters from us seemed less threatening and they had some reason to believe that whether wa convey the message ovar the phone or in a letter, we will deal with them in a forthright and trustworthy manner. This discussion surrounding the letter made claar to all the participants that in order to

have some success in our process, we had to raise our level of trust, while respecting our differences. All the participants in that meeting agreed that it would not be easy, nor a short process, but that it would be worthwhile.

In closing, I would like to challenge the subcommittee to take the high road on these provisions misleadingly called "Procedural Safeguards for Agricultural Litigation". The effect of these proposals is to deny equal justice to migrant farmworkers, by mandating that the legal services attorneys who represent them use alternative dispute resolution in all situations, regardless of the best interests of the client, even though such systems do not currently exist. As a group, or individually , these "procedural safeguards" are really additional barriers to justice for farmworkers. Farmworkers face many obstacles to the legal system that even other poor people do not face. They live in rural, isolated areas, usually in employer-supplied housing under employer scrutiny. They face the prospect of losing their jobs and housing if they complain about working or living conditions or sometimes if they are merely suspected of complaining. They usually do not have permanent ties to the communities they work in and are perceived by those communites as outsiders. Almost all are minority; many are aliens; many do not speak English. All of these characteristics add up to enormous barriers to justice. Without help, many are unable to deal successfully with unscrupulous labor contractors, indifferent or hostile growers, uncaring public benefits or health workers, and other officials. Those migrant farmworkers

who are willing to assert their rights do so despite enormous pressures and with a lot of courage. They deserve our utmost respect and the very best efforts of this commitee to ensure that they have the same rights to our legal system as everyone else in our society.

Mr. FRANK. I have no questions. I appreciate your coming. As I said before, I expect to have a lot of these conversations that are going forward.

I have just one question, Ms. Hall. The migrants in North Carolina, are they primarily citizens, noncitizens, what's the language pattern? Are they all noncitizens or mostly noncitizens? Do they all speak English, or mostly, or what?

Ms. HALL. It's changed over the years. The first time I went to North Carolina migrant labor camps was in 1977.

Mr. FRANK. I don't care about 1977. I have a short memory. What about today?

Ms. HALL. Today, it's predominantly Hispanic, probably 85 percent Hispanic. I don't know——

Mr. FRANK. Whether they are citizens or noncitizens? So you do have the language problem in part?

Ms. HALL. Most of our clients do not speak English.

Mr. FRANK. Thank you, Ms. Hall.

Thank you. We appreciate it and we will be in further touch with you.

Mr. SAUCEDO. Thank you.

Mr. FRANK. We call the next panel: Mr. Wilson, Mr. Ward, Mr. Cureton, come forward.

We apologize for the small number of members—we can't always predict these things. I would point out that when we had the hearing 2 weeks ago, Congresswoman Byron, Congressman McCollum and Congressman Stenholm took up much of the hearing so that it is not that your viewpoint is being shorted, and many of the members heard that—we try and balance it. The last time the people who were more critical came first; this time the people who were less critical came first—but members do read this.

We will begin with Mr. Wilson because Mr. Wilson is first on my list.

STATEMENT OF THOMAS E. WILSON, ESQ., OF SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, WASHINGTON, DC, ON BEHALF OF THE NEW ENGLAND APPLE COUNCIL

Mr. WILSON. Thank you, Mr. Chairman. I would hope that my statement——

Mr. FRANK. Without objection, any statements and any supporting material you want to put in we will put in the record.

Mr. WILSON. Thank you, Mr. Chairman.

My name is Thomas E. Wilson. I am a partner in the Washington, DC, office of the law firm of Seyfarth, Shaw, Fairweather & Geraldson.

Since 1983, I have represented the New England Apple Council and other organizations of east coast apple growers in numerous lawsuits and administrative proceedings. Every one of those proceedings has been engendered by publicly funded lawyers employed by grantees of the Legal Services Corporation.

The experience of the apple growers makes a strong case that the time has come to enact reforms designed to assure that LSC grantees conduct their affairs in a manner consistent with the original intent of the Legal Services Corporation Act—that is, pro-

viding for the day-to-day legal needs of the poor, rather than engaging in broad, administrative rulemaking cases designed to frustrate the operation of Government programs which LSC-grantee lawyers believe should not exist.

In order for the subcommittee to have a proper understanding of the experience of the apple growers, some background is appropriate.

NEAC and the other east coast apple growers have, for many years, found it impossible to recruit an adequate supply of apple harvest workers from the domestic agricultural work force.

This reality has forced the apple growers to choose between (1) harvesting their apples using undocumented workers from the agricultural-labor black market which led to the reforms reflected in the Immigration Reform and Control Act of 1986; or (2), importing harvest workers from abroad to supplement the available domestic work force through the so-called H-2 program offshore-worker program administered by the Department of Labor and the Immigration and Naturalization Service.

The apple growers opted to use legally obtained workers through the H-2 program —now under IRCA, the H-2A program.

H-2 program participants are among the most heavily regulated agricultural organizations in this Nation. Wage rates are established by the U.S. Government. Growers are required to house their harvest workers free of charge. Grower housing is inspected before each harvest season and must meet State and Federal health and safety standards.

Grower payroll records and employment practices are monitored by State and Federal officials to ensure that all requirements of the H-2 program are complied with.

Given the comprehensive regulatory requirements the H-2 growers must meet in order to participate in the H-2 program, it is hardly surprising that allegations of farmworker mistreatment by apple growers who use the H-2 program are virtually nonexistent.

Despite their adherence to DOL-imposed requirements of the H-2 program, the apple growers have for many years been subjected to a torrent of litigation instigated by publicly funded LSC grantees. Such litigation typically does not involve allegations that the apple growers have in any way mistreated their workers. Rather, LSC-grantee lawsuits are designed to secure reinterpretations of DOL regulations calculated to drive up the cost of participation in the H-2 program to a point where use of the program will be unfeasible.

LSC-grantee lawyers, on repeated occasions, have proclaimed publicly that they believe the H-2 program is bad public policy and that, therefore, the program should be eliminated. In fact, a number of the same lawyers who, over the years, have engaged in sustained litigation against the apple growers were actively involved in the legislative process associated with IRCA attempted unsuccessfully to hobble the H-2A provisions of that legislation.

Because of the undeniable shortage of documented domestic workers to satisfy the harvest labor needs of this Nation's agricultural economy, opponents of the H-2 program have no factual basis for eliminating the program's existence.

Be that as it may, if LSC-sponsored lawyers are successful through litigation in making the H-2 program so expensive that no grower can afford to use it, they will have achieved the same result as would occur were the program to be legislatively eliminated.

Let me give you one specific example of how LSC-grantee lawyers have created havoc within the H-2 program. In 1982, farmworker advocates objected to the pay practices of several apple growers in West Virginia. Instead of suing the affected apple growers, and perhaps DOL, in West Virginia where all the parties could be found, the farmworkers sued only DOL—not in West Virginia—but in the District of Columbia.

The central matter of issue in the lawsuit was a DOL regulation controlling the year-to-year adjustments made in piece rates which users of the H-2 program were required to pay.

Since, if the farmworker advocates prevailed, H-2 program piece rates would be dramatically escalated, DOL argued to the court that the absent growers who would be asked to pay the higher rates were indispensable parties to the litigation.

Since the District of Columbia court could not join those absent growers in the case, DOL argued that the litigation should be dismissed. The LSC-grantee advocates vigorously and successfully opposed DOL's motion.

As a consequence, the rights of the affected West Virginia farmers were adjudicated in the District of Columbia entirely in their absence. The LSC lawyers secured an injunction against DOL which forced DOL to require the growers to pay dramatically higher piece rates.

In 1983, the LSC-sponsored lawyers went back into the District of Columbia court and had the ruling which originally affected only the West Virginia farmers expanded to impact upon all users of the H-2 program.

As a consequence, the piece rate wages of every grower using the H-2 program were dramatically escalated pursuant to a judicial determination engineered by LSC-grantee lawyers without a single grower ever appearing in the courtroom where the controlling decisions were made.

Since the events of 1983, LSC-grantee lawyers have systematically tried to force the apple growers to pay the higher wage rates mandated in the growers' absence. Because the wage rates engineered by the farmworker advocates would inflict financial ruin on the growers, the growers have had to resist the escalated wage rates in court. That effort, in turn, has brought about sustained litigation which has cost the growers a fortune in legal fees.

The piece rate wage rates mandated by the District of Columbia court at the behest of the LSC-sponsored advocates were so enormous that in 1986, the apple growers up and down the east coast abandoned their traditional piece rate method of pay in favor of wage payments by the hour.

When that happened, the LSC-grantee advocates brought suit again—twice. This time they argued that the hourly wage rates which DOL authorized the growers to pay during the 1986 harvest season were not sufficiently high and had to be adjusted upward in order to approximate the average hourly earnings generated by workers in previous years working at piece rates.

In other words, the farmworker advocates insisted that the H-2 program users be required to pay incentive wage rates even under circumstances where the wage structure would not produce the kind of productivity inherent in piece work.

After incurring huge legal fees, the growers won both of the 1986 lawsuits. But the expense for the growers associated with the 1986 experience is still not over. The farmworker advocates have appealed their loss of one of the lawsuits, and that appeal is currently pending before the fourth circuit.

Suffice it to say that, at every step of this grim process, even if they win in court, the growers are being bled to death by the cost of the participation in the process. For their part, it is a matter of complete indifference to the farmworker advocates whether H-2 users abandon the program because the wage rates required are too high or because the legal fees are too steep. Either way, their ultimate goal—the eradication of the H-2 program—will have been accomplished.

The H-2 program uses are job providers. They voluntarily embrace a Government program which imposes upon them significant requirements. At the same time, that program guarantees the growers access to the harvest labor that they need to harvest their crops under circumstances where the wages and working conditions of the farmworkers workers are not adversely affected. It seems singularly inappropriate for publicly funded LSC grantees to use the court as a tool to scuttle a congressional sanctioned program that fulfills an important need in our agricultural economy.

In light of the experience we and others have had with LSC grantees in this area, it is vitally important that meaningful and effective reforms be institute in order to avoid having the litigation process continue to be a weapon to undermine a national policy which Congress has repeatedly reaffirmed.

Thank you for your attention, Mr. Chairman. Should you have any questions, I would be happy to answer them.

Mr. FRANK. Thank you, Mr. Wilson.

[The prepared statement of Mr. Wilson follows:]

Before the

SUBCOMMITTEE ON ADMINISTRATIVE

LAW AND GOVERNMENTAL RELATIONS

Of The

HOUSE JUDICIARY COMMITTEE

May 23, 1990

STATEMENT OF THOMAS E. WILSON
OF SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
ON BEHALF OF THE NEW ENGLAND APPLE COUNCIL

Introduction

Mr. Chairman, my name is Thomas E. Wilson. I am a partner in the Washington, D.C. office of the law firm of Seyfarth, Shaw, Fairweather & Geraldson.

Since 1983, I have represented the New England Apple Council, Inc. ("NEAC") and other organizations of East Coast apple growers (the "apple growers") in numerous lawsuits and administrative proceedings. Every one of those proceedings has been engendered by publicly funded lawyers employed by grantees of the Legal Services Corporation ("LSC"). The experience of the apple growers makes a strong case that the time has come to enact reforms designed to assure that LSC grantees conduct their affairs in a manner consistent with the original intent

of the Legal Services Corporation Act -- that is, providing for the day-to-day legal needs of the poor, rather than engaging broad, administrative rulemaking cases designed to frustrate the operation of government programs which LSC-grantee lawyers believe should not exist.

In order for the Subcommittee to have a proper understanding of the experience of the apple growers, some background is appropriate. NEAC and the other East Coast apple growers have, for many years, found it impossible to recruit an adequate supply of apple harvest workers from the domestic agricultural workforce. That reality has forced the apple growers to choose between (1) harvesting their apples using undocumented workers from the agricultural-labor black market which led to the reforms reflected in the Immigration Reform and Control Act of 1986 ("IRCA"), or (2) importing harvest workers from abroad to supplement the available domestic workforce through the so-called H-2 offshore-worker program administered by the Department of Labor ("DOL") and the Immigration and Naturalization Service ("INS"). The apple growers opted to use legally obtained workers through the H-2 program (now, under IRCA, the "H-2A program").

Description of the H-2 Program

Under the H-2 program, the apple growers are permitted to supplement their domestic workforce with temporary offshore

workers. They can do this only if the employment of temporary alien workers will not adversely affect the wages and working conditions of the domestic workforce. To participate in the program, the apple growers submit job clearance orders to DOL for approval. The clearance orders contain a comprehensive description of the wages and working conditions involved in the job being offered. Once approved, DOL recruits against the job order for a period of sixty days. Thereafter, if sufficient numbers of domestic workers have not responded to the job described in the clearance order, DOL certifies that the importation of offshore workers will not adversely affect the wages and working conditions of domestic workers. Thereafter, the apple growers take their DOL certifications to INS. INS issues visas and offshore workers are brought into the country to begin their work. Once the harvest work is completed, the alien workers are returned to their place of origin.

H-2 program participants are among the most heavily regulated agricultural organizations in this nation. Wage rates are established by the U.S. government. Growers are required to house their harvest workers free of charge. Grower housing is inspected before each harvest season and must meet state and federal health and safety standards. Grower payroll records and employment practices are monitored by state and federal officials to insure that all requirements of the H-2 program are complied with.

Given the comprehensive regulatory requirements the H-2 growers must meet in order to participate in the H-2 program, it is hardly surprising that allegations of farmworker mistreatment by apple growers who use the H-2 program are virtually nonexistent.

Lititation Under the H-2 Program

Despite their adherence to DOL imposed requirements of the H-2 program, the apple growers have for many years been subjected to an torrent of litigation instigated by publicly-funded LSC grantees. Such litigation typically does not involve allegations that the apple growers have in any way mistreated their workers. Rather, LSC-grantee lawsuits are designed to secure reinterpretations of DOL regulations calculated to drive up the cost of participation in the H-2 program to a point where use of the program will be unfeasible.

LSC-grantee lawyers, on repeated occasions, have proclaimed publicly that they believe the H-2 program is bad public policy and that, therefore, the program should be eliminated. In fact, a number of the same attorneys who, over the years, have engaged in sustained litigation against the apple growers were actively involved in the legislative process associated with IRCA attempted unsuccessfully to hobble the H-2A provisions of that legislation. Because of the undeniable shortage of documented domestic workers to satisfy the harvest

labor needs of this nation's agricultural economy, opponents of the H-2 program have no factual basis for eliminating the program's existence. Be that as it may, if LSC sponsored lawyers are successful through litigation in making the H-2 program so expensive that no grower can afford to use it, they will have achieved the same result as would occur were the program to be legislatively eliminated.

Let me give you one specific example of how LSC-grantee attorneys have created havoc within the H-2 program. In 1982, farmworker advocates objected to the pay practices of several apple growers in West Virginia. Instead of suing the affected apple growers, and perhaps DOL, in West Virginia where all the parties could be found, the farmworkers sued only DOL -- not in West Virginia -- but in the District of Columbia. NAACP v. Donovan, 558 F. Supp. 218 (D.D.C. 1982).

The central matter at issue in the lawsuit was a DOL regulation controlling the year-to-year adjustments made in piece rates which users of the H-2 program were required to pay. Since, if the farmworker advocates prevailed, H-2 program piece rates would be dramatically escalated, DOL argued to the court that the absent growers who would be asked to pay the higher rates were indispensable parties to the litigation. Since the District of Columbia court could not join those absent growers in the case, DOL argued that the litigation should be dismissed. The LSC-grantee advocates vigorously and

successfully opposed DOL's motion. As a consequence, the rights of the affected West Virginia farmers were adjudicated in the District of Columbia entirely in their absence. The LSC lawyers secured an injunction against DOL which forced DOL to require the growers to pay dramatically higher piece rates.

In 1983, the LSC-sponsored lawyers went back into the District of Columbia court and had the ruling which originally affected only the West Virginia farmers expanded to impact upon all users of the H-2 program. NAACP v. Donovan, 566 F. Supp. 1202 (D.D.C. 1983). As a consequence, the piece rate wages of every grower using the H-2 program were dramatically escalated (in some instances, by 40 percent in a single year) pursuant to a judicial determination engineered by LSC-grantee lawyers without a single grower ever appearing in the courtroom where the controlling decisions were made.

Since the events of 1983, LSC-grantee lawyers have systematically tried to force the apple growers to pay the higher wage rates mandated in the growers' absence. Because the wage rates engineered by the farmworker advocates would inflict financial ruin on the growers, the growers have had to resist the escalated wage rates in court. That effort, in turn, has brought about sustained litigation which has cost the growers a fortune in legal fees.

The piece rate wage rates mandated by the District of Columbia court at the behest of the LSC-sponsored advocates was

so enormous that, in 1986, the apple growers up and down the East Coast abandoned their traditional piece rate method of pay in favor of wage payments by the hour. When that happened, the LSC-grantee advocates brought suit again -- twice. Donaldson v. McLaughlin, No. 86-C-0088(R) (W.D. Va. Aug. 12, 1988); Morrison v. McLaughlin, 713 F. Supp. 664 (S.D.N.Y. 1989). This time they argued that the hourly wage rates which DOL authorized the growers to pay during the 1986 harvest season were not sufficiently high and had to be adjusted upward in order to approximate the average hourly earnings generated by workers in previous years working at piece rates. In other words, the farmworker advocates insisted that H-2 program users be required to pay incentive wage rates even under circumstances where the wage structure (hourly wage rates) would not produce the kind of productivity inherent in piece work. After incurring huge legal fees, the growers won both of the 1986 lawsuits. But the expense for the growers associated with the 1986 experience is still not over -- the farmworker advocates have appealed their loss of one of the lawsuits, and that appeal is currently pending before the Fourth Circuit.

In addition to the 1986 litigation just described, the successful effort of the farmworker advocates in securing a reinterpretation of DOL's piece rate regulation in the District of Columbia precipitated other litigation with respect to the appropriate wage rates required by the H-2 program in 1983 and

1985. That litigation is currently pending before the trial court in the District of Columbia and it is nowhere near being resolved. FCFGA v. Dole, 709 F. Supp. 242 (D.D.C. 1989). Moreover, once a definitive decision is reached by the trial court, the losing parties will almost certainly appeal the decision to the D.C. Circuit. For that reason, the appropriate wage rates for 1983 and 1985 are likely to remain in dispute for some time yet to come.[1/]

Suffice it to say that, at every step of this grim process, even if they win in court, the growers are being bled to death by the cost of the participation in the process. For their part, it is a matter of complete indifference to the farmworkers advocates whether H-2 users abandon the program because the wages rates required are too high or because the litigation fees are too steep. Either way, their ultimate goal -- the eradication of the H-2 program -- will have been accomplished.

Conclusion

The H-2 program users are job providers. They voluntarily embrace a government program which imposes upon

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1/ In addition to these cases, press reports indicate that LSC-sponsored advocates have brought litigation in other areas as well. For example, LSC lawyers have representend undocumented aliens challenging the determinations of the U.S. Department of Agriculture regarding which farmworkers should be eligible for adjustment of status under IRCA.

them significant requirements. At the same time, that program guarantees the growers access to the harvest labor that they need to harvest their crops under circumstances where the wages and working conditions of domestic workers are not adversely affected. It seems singularly inappropriate for publicly-funded LSC grantees to be using the courts as a tool to scuttle a congressionally sanctioned program that fulfills an important need in our agricultural economy. In light of the experience we and others have had with LSC grantees in this area, it is vitally important that meaningful and effective reforms be instituted in order to avoid having the litigation process continue to be a weapon to undermine a national policy which Congress has repeatedly reaffirmed.

Thank you for your attention. Should you have any questions, I would be happy to answer them.

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Mr. FRANK. Mr. Ward.

STATEMENT OF JEFFREY J. WARD, ESQ., ON BEHALF OF SUGAR CANE GROWERS COOPERATIVE OF FLORIDA

Mr. WARD. Mr. Chairman, my name is Jeffrey Ward. I am in-house attorney for Sugar Cane Growers Cooperative; it's a farmer-owned agricultural cooperative with 54 members, including many pioneer family farmers who first settled the Everglades agricultural area.

You have asked for some examples of abuses that we feel are occurring, and harassment of Legal Services' grantee activities. I will touch on only a few of the highlights and let you read my prepared statement for the remainder of them.

On July 9, 1985, the Farmworker Justice Fund, together with the Migrant Legal Aid Bureau and Florida Rural Legal Services, filed what's now known as the *Marquis* case——

Mr. FRANK. Are they all three grantee organizations?

Mr. WARD. No, that I'll get into. Farm Worker Justice——

Mr. FRANK. All right.

Mr. WARD [continuing]. They claim not to be a grantee organization, as I understand it.

Although the case was filed on behalf of a class of U.S. workers, none of the 13 plaintiffs was a citizen or lawful permanent resident of the United States. They were all illegal immigrant Haitians claiming to represent a class of U.S. workers.

While the Farmworker Justice Fund claims to receive no Federal funds, it's noteworthy that one of the farmworker attorneys appearing on behalf of FJF was an MLAP director at the time of the filing of the suit and a full-time salaried employee of a Legal Services grantee.

If you will look at exhibit B and the package I submitted in July 1985, the Farmworker Justice Fund filed a lobbyist registration listing interest in the Justice Appropriations Act which includes Legal Services Corporation funding; interest in Simpson-Mazzoli and also in the H-2 program. And the lobbyist listed for FJF was Garry Geffert, a salaried employee of the West Virginia Legal Services Plan, Inc.

If you will look at exhibit D, on May 9, 1986, this is an example of a worker authorization for release of information that was signed. There were hundreds of these signed. You can tell from the dates of the signatures on the authorizations that I have in my file, and we will provide additional copies if you need them, that these workers were H-2 workers and they were in Jamaica or other islands in the Caribbean at the time they signed these authorizations.

It's noteworthy that these authorizations were signed months prior to the passage of IRCA. And at the time this particular affidavit that's attached was signed, Legal Services grantee attorneys were lobbying Congress seeking to eliminate the H-2 program—and I think rather paradoxically at the same time, trying to obtain congressional authorization to represent these workers who were filling our these authorizations.

I think it's noteworthy, too, if you will look at exhibit G and exhibit I, we have the same attorney signing letters—one on stationery of the Farmworker Justice Fund, another on the stationery of MLAP. I want you to note that the addresses of MLAP and Farmworker Justice Fund are identical, except that MLAP is in suite 310 and FJF is in suite 312.

If you will look at exhibit J, on December 11, 1987, we received a letter from Farmworker Justice Fund—again in the *Marquis* case, which had Legal Services grantees on the pleadings—and the letter stated that "We have information that plaintiffs Valet Charles and Edvar Nicholas are deceased."

If you will look at item 12, exhibit K, April 14, 1988, a second amended complaint was filed in the *Marquis* case. The two now deceased plaintiffs are still named in the amended complaint and it is asserted that they are farmworkers residing in Florida who are ready, willing, and able to cut sugarcane.

Mr. FRANK. What's the date on that?

Mr. WARD. That was April 14, 1988. You will see the date on the certificate of service.

Mr. FRANK. These are around Eastertime.

[Laughter.]

Mr. WARD. Another of the Marquis plaintiffs named in this amended complaint later admitted in interrogatories that he has been in jail in North Carolina since 1987—so well prior to the filing of this amended complaint—serving a 14-year sentence for trafficking in cocaine.

What are the real world consequences of the everlasting litigation that we've been engaged in?

In the 1987-88 crop season, Sugar Cane Growers Cooperative employed 1700 cane cutters. In the season just ended, we employed 800 cane cutters.

I can tell you, I sat in the president's office and told him that due to all these Legal Services grantee attacks on our program, we did not have a politically stable work force. We had a good work force but not one we could count on in a pinch; and that pinch came when when in the AFL-CIO case, brought by MLAP, the district court judge entered an order enjoining the operation of the program 3 months before our crop started.

Mr. BERMAN. Which president's office did you sit in?

Mr. WARD. The president of my company's office.

No, I have not sat in President Bush's office; or Reagan's—either one.

Anyway, we're cutting the same amount of cane but we used 1,700 cane cutters then and we've embarked on a mechanization program and we've cut down the number of workers in our work force to 800 cutters; and the Legal Services grantee activity is the principal reason why those 900 people lost their jobs.

I wish you would look at the dialog that occurs in another attachment between Congress Madigan and the Jamaican Secretary of Labor, where they talk about the wage scales. The worker in Jamaica makes $3.10 a day in U.S. currency equivalent; while in Florida, the average cutter makes $40 a day, and more.

So this is what these men are facing. It's $3.10 a day in Jamaica or $40 a day, plus, in Florida sugarcane.

As far as the point that was made earlier about our workers having some of the lowest wages in America, for the cane cutters who just completed our last harvest season, the total average hourly wage was $7.25 an hour. You may not think that's a lot of money for cutting cane, but it's a relatively high wage, I think.

Lawyers who are truly interested in the welfare of their clients should be trying to preserve these jobs instead of working to eliminate the H-2A program. If the true goal of the lawyers is to eliminate the H-2A programs, the attorney's interest is adverse to that of his client, and he has no business representing him.

I want to go on to mention what's happened in Dade County, Florida. You've heard previously about the job losses in Maryland that occurred. The attorney that was handling the cases in Maryland went to Dade County, FL. And at the time he arrived, 80 percent of the 16,000-acre south Dade snapbean crop was being harvested by hand. In the season that just ended, only 10 percent of that same crop was hand-harvested and the other 90 percent was mechanically harvested.

I can't get a precise number of the jobs that were lost, but seasonal job losses in that case ran into the thousands.

I would like to comment briefly on the reform provisions that would enlist the Legal Services lawyers in the war on drugs.

My office is in Belle Glade, FL, a city that has suffered terribly from the AIDS crisis. They say a lot of things that are exaggerated about us but it's hard to exaggerate the problems we've suffered on that score.

A just-released National Institute of Drug Abuse Study in Belle Glade has found that AIDS is being primarily transmitted heteorosexually among crack cocaine users. And they were surprised to find very little intravenous drug use in Belle Glade. That used to be a problem, but they've switched from intravenous drugs to crack cocaine. And prostitution to obtain either crack or money to buy crack, is becoming a principal cause of the spread of the disease; and I believe we have more females than males with AIDS at this time in Belle Glade, FL, which is an exception to the national pattern.

Community leaders in Belle Glade—I'd like to mention specifically one of my sugar farmer directors who has been a long-time head of the Belle Glade Housing Authority—have struggled for years to try to provide decent housing—and we're having some problems getting the last project finished, but there's one that's on-line that will house a lot of people and greatly improve the situation and let the city go ahead with some condemnation of some housing none of us can be proud of.

I hope you will pass this bill and help us keep crack cocaine out of our new public housing projects. That's the number one problem that Belle Glade, FL, has right now, and these reform packages would greatly assist in that effort.

Mr. FRANK. Thank you, sir.

[The prepared statement of Mr. Ward follows:]

STATEMENT OF JEFFREY J. WARD

ON BEHALF OF SUGAR CANE GROWERS COOPERATIVE OF FLORIDA

TO THE HOUSE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE LAW

WITH REGARD TO LEGAL SERVICES REFORM LEGISLATION

MAY 23, 1990

Mr. Chairman, Congressman James, thank for you the opportunity to appear before you today and speak regarding Legal Services Reform Legislation. My name is Jeff Ward. I appear today on behalf of Sugar Cane Growers Cooperative of Florida, a farmer owned agricultural cooperative with 54 members. Among our members are many of the pioneer family farmers who first settled the Everglades Agricultural Area. I have been employed by the Cooperative as its in-house counsel since 1981. Throughout the nine years of my employment, the Cooperative, either as a named party or through its membership in larger agricultural associations, has been embroiled in continuous litigation with Legal Services Corporation grantees.

Mr. Chairman, it is my understanding that you have asked those in agriculture who believe they have been harassed by these grantees to provide specific examples of abuses. I am prepared to do so today. But I must make it clear at the outset that my sole purpose is to make Congress aware of these abuses. I have never filed an ethics charge against any attorney and have no plans to do so.

The litigation in which we have been involved, directly or indirectly, is extraordinarily complex. I find that placing events in chronological order helps immensely to simplify a complex series of events. The critical events are as follows:

1. May 17, 1985--The outside auditor of grantee Migrant Legal Action Program ("MLAP") informs the Executive Committee that he has discovered, in the course of an audit, certain financial irregularities involving MLAP's Executive Director. (See In Re: Migrant Legal Action Program, Inc., Recommended Decision of Hearing Examiner).

2. July 9, 1985--Ed Tuddenham and Kristine Poplawski, acting as representatives of the Farmworker Justice Fund ("FJF"), file Marquis, et al. v. United States Sugar Corporation ("Marquis") in the Federal District Court for the Southern District of Florida. (See Exhibit A). Although the case is filed on behalf of a class of United States workers, none of the 13 purported class representatives is a citizen or lawful permanent resident of the United States (as of this date). While FJF claims to receive no federal funds, Ms. Poplawski is an MLAP Director and a full-time salaried employee of a Legal Services grantee--the Illinois Migrant Legal Assistance Project. (See Lopez-Silvero affidavit of September 18, 1986).

3. July, 1985--FJF files a lobbyist registration listing interest in the Justice Appropriations Act (which includes Legal Services Corporation funding), the Simpson-Mazzoli Immigration Act, the Legal Services Corporation Act and the H-2 program. The lobbyist is Garry Geffert, a salaried employee of West Virginia Legal Services Plan, Inc. (Exhibit B).

4. September 19, 1985--First Amended Complaint filed in Marquis. (Exhibit C). There are now 20 named plaintiffs. Four of the original 13 have been dropped. Eleven new plaintiffs are added.

5. January 9, 1986--MLAP first advises Legal Services Corporation of the investigation of the MLAP Executive Director and reports the resolution of the matter. (Hearing Examiner, supra).

6. May 9, 1986--This is an example of one of hundreds of authorizations signed almost entirely by H-2 workers. (Exhibit D). The records were to be (and in fact were later released) to various Legal Service Corporation grantees. Please note that this authorization was signed months before the enactment of IRCA. Around the time this affidavit was signed, some Legal Services grantee attorneys were lobbying Congress seeking to eliminate the H-2 program and, rather paradoxically, to obtain congressional authorization to represent H-2 workers.

7. February 25, 1987--Deposition subpoena in **NAACP** directed to the Cooperative (Exhibit E). Note that Mr. Tuddenham, formerly of FJF, is now with MLAP.

8. March 5, 1987--Mr. Tuddenham, of MLAP, moves to intervene in **FFVA v. Brock** case on behalf of both H-2a and domestic workers. FJF also appears (Exhibit F).

9. July 23, 1987--FJF letter (Exhibit G). Evidently, Mr. Tuddenham is back with FJF again.

10. August 5, 1987--In the **AFL-CIO** case brought by MLAP and others, Judge Sporkin enters an order invalidating the Department of Labor's adverse effect wage rate and piece rate regulations and enjoining the operation of the H-2a program. This order was later stayed and, after two trips to the Court of Appeals, the DOL regulations were ultimately upheld. Nonetheless, the shock of entry of the order enjoining the H-2a program just three months prior to the beginning of our harvest season had a great deal to do with the Cooperative's decision to expand its mechanical harvesting program. (See Exhibit H--Miami Herald article of December 17, 1989).

11. August 25, 1987--MLAP letter (Exhibit I). Mr. Tuddenham is now with MLAP! Please note that the addresses are identical except that MLAP is in Suite 310 and FJF in Suite 312.

Statemeot of Jeffrey J. Ward

11. December 11, 1987--FJF Letter io the **Marquis** case stating that "We have ioformatioo that plaintiffs Valet Charles and Edvar Nicholas are deceased." (Exhibit J).

12. April 14, 1988--Secood ameoded complaiot filed in **Marquis** (Exhibit K). The two oow deceased plaiotiffs are still named io tbe ameoded complaint aod it is asserted that tbey are farm workers residiog in Florida who are ready, willing and able to cut sugar cane! (Exhibit K). Another of the **Marquis** plaintiffs named in this amended complaiot later admitted in interrogatories that he has been in jail io North Carolina since 1987 serving a 14 year seoteoce for trafficking in cocaine. Note that Mr. Tuddenham is still in the case but he has now switched to representing MLAP. FJF remains in the case as well.

13. February 20, 1990--In the **NAACP** case now pending before Judge Richey in the D.C. Circuit, MLAP says "Intervenors describe Farmworker Justice Fund as 'plaintiffs' colleagues in an attempt to concoct a relationship between the two where none exists." (Exhibit L). Words fail me.

Virtually all of the cases described above continue to this day to drag on endlessly. Nearly five years after **Marquis** was filed, no class has been certified and not one of the named plaintiffs deposition has been taken.

What are the real world consequences of this everlasting litigation? In the 1987/88 season (shortly after the injunction was issued that temporarily shut down the H-2a program), the Cooperative employed 1700 cane cutters. In the season just ended, we employed 800 cane cutters. How important are these jobs to these H-2a workers? Judge from reading the attached dialogue between Congressman Madigan and the Jamaican Secretary of Labour. The worker in Jamaica makes $3.10 a day. While in Florida, the average cutter makes $40.00 a day and more. In the season just ended, average total compensation paid to the Cooperative's cane cutters was $7.25 per hour. Lawyers who are truly interested in the welfare of their clients should be trying to preserve these jobs instead of working to eliminate the H-2a program.

I would be remiss if I did not point out other job losses in South Florida caused, at least in part, because of Legal Services grantee activities. The Dade County Farm Bureau informs me that in the 1987 harvest season, 80% of the 16,000 acre South Dade snap bean crop was harvested by hand. In the season just ended, only 10% of the same crop was hand harvested. I cannot precisely quantify the number of seasonal jobs lost, but it runs into the thousands. In this case, the jobs lost were held by American resident workers.

I have already taken up too much time, so I will let others describe how the Legal Services Reform measures will help remedy the present sad situation. I urge adoption of the Reform package. Thank you for your consideration.

EXHIBIT A

IV 1 (Rev. 10/82) SUMMONS IN A CIVIL ACTION

United States District Court	DISTRICT Southern District, West Palm Beach Division
	DOCKET NO. 85-8388
JEAN CLAUDE MARQUIS, et al., V. UNITED STATES SUGAR CORP. et al.	TO: (NAME AND ADDRESS OF DEFENDANT) SUGAR CANE GROWERS COOPERATIVE OF FLORIDA R. Bruce Jones, Reg. Agent 601 Flagler Drive Ct. West Palm Beach, Florida 33402

YOU ARE HEREBY SUMMONED and required to serve upon

PLAINTIFF'S ATTORNEY (NAME AND ADDRESS)

Edward J. Tuddenham
Kristina Poplawski
FARMWORKER JUSTICE FUND
2001 S St NW Suite 312
Washington, D.C. 20009

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK	DATE
Robert M. March	JUL - 9 1985
(BY) DEPUTY CLERK	
Eugene [illegible]	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

JEAN CLAUDE MARQUIS, INNOCENT DESIR, MICLISE OCSUIS, EDVAR NICHOLAS, WILFRED PIERRE, CEBONET ALEXANDRE, HUBERT DELVA, ROGER FLEURANTISSE, PIERRE FRANCOIS, ANTHONY LASPINASSE, LUC AFRICAIN, MISIUS TANUS, KESNEL OLIBRICE, and all others similarly situated,	*	85-8388
Plaintiffs	*	C.A. No._____
v.	*	
UNITED STATES SUGAR CORPORATION, ATLANTIC SUGAR ASSOCIATION, GULF AND WESTERN FOOD PRODUCTS, CO., OSCEOLA FARMS CO., SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, CANE CONTRACTORS INC., SUGAR CANE HARVESTING, INC., SHAWNEE FARMS, INC., OKEELANTA CORP., and FLORIDA FRUIT AND VEGETABLE ASSOCIATION,	*	COMPLAINT
Defendants	*	CLASS ACTION Jury Demanded

Introductory Statement

1. Plaintiffs, thirteen United States farm workers, complain of various unlawful employment practices designed by Defendants to exclude United States farm workers from employment in the Florida sugarcane harvest so that Defendants can unlawfully import foreign workers to harvest their cane. Defendants' unlawful employment practices consititute violations of the Sherman Anti-Trust Act, 15 U.S.C. §§1 and 2; the Wagner-Peyser Act (hereafter WPA), 29 U.S.C. §49 et seq.; the Farm Labor

requirements of AWPA and the terms of the working arrangement as defined by AWPA; and

8. failing to comply with the requirements of the Wagner-Peyser Act and the regulations promulgated thereunder.

D. Award Plaintiffs and their class damages as follows:

1. treble damages for the injury they have suffered result of Defendants' violations of the Sherman Act and the Florida Anti-Trust Act;

2. statutory or actual and punitive damages for Defendants violations of FLCRA and AWPA;

3. actual and punitive damages for Defendants' violations of the Wagner-Peyser Act, 42 U.S.C. §§1981 and 1985, and breach of contract.

E. Award Plaintiffs their costs, and reasonable attorneys fees.

F. Award such other relief as this Court deems just and proper.

Respectfully submitted,

Edward J. Tuddenham
Kristine Poplawski
FARMWORKER JUSTICE FUND
2001 "S" St. N.W. Suite 312
Washington, D.C. 20009
(202) 462-8192

James K. Green
GREEN, EISENBERG, and COHEN
301 Clematis Suite 409
West Palm Beach, Florida
(305) 659-2009

Mary Lee Hall
Florida Rural Legal
Services
P.O. Drawer 1499
305 No. Jackson Avenue
Bartow, FL 33830

Gregory Schell
LEGAL AID BUREAU
111 High St.
Salisbury, MD

ATTORNEYS FOR PLAINTIFFS

Dated: July 4, 1985

EXHIBIT B

CENTER FOR CIVIC EDUCATION, Calabasas, Calif. Lobbyist — Dechert, Price & Rhoads, 1730 Pennsylvania Ave. N.W., Washington, D.C. 20006. Filed 6/21/85. Legislative interest — "Youth education programs and projects in civic responsibility."

COMMITTEE FOR THE ELECTRIC CONSUMERS PROTECTION ACT, 1000 Potomac St. N.W., Washington, D.C. 20007. Filed for self 6/6/85. Legislative Interest — "... support efforts to pass the Electric Consumers Protection Act (HR 44/S 4261."

CONSUMERS UNITED FOR RAIL EQUITY, Washington, D.C. Lobbyist — Craft & Richards, 1050 Thomas Jefferson St. N.W., Washington, D.C. 20007. Filed 6/12/85. Legislative interest — "... Staggers Rail Act Amendments."

ENVIRONMENTAL SCIENCE & ENGINEERING, Baton Rouge, La. Lobbyist — Richard W. Bliss, 3242 Grace St. N.W., Washington, D.C. 20007. Filed 6/17/85. Legislative interest — "... disposal of hezardous waste into solution mined salt formations."

FARMWORKER JUSTICE FUND INC., 2001 S St. N.W., Washington, D.C. 20009. Filed for self 6/21/85. Legislative interest — "... general legislative interest in matters directly affecting FJF clients, as well as those which impact on farmworkers in the U.S. ... The Simpson-Mazzoli Immigration Reform and Control Act of 1983; FY 1984 Appropriations for the Departments of State, Justice, Commerce and Related Agencies; FIFRA Reform Act Amendments of 1983; Appropriations rider(s) to the FY 1984 Labor-HHS Appropriations bill (and supplemental appropriations); the Omnibus Budget and Reconciliation Act; various proposals to amend the Fair Labor Standards Act ... 8 USC section 1101(e)(15)(H)(ii); 42 USC sections 2996 et seq.; 7 USC sections 136a-k; 29 USC sections 851 et seq. 29 USC 201 et seq...." Lobbyist — Garry Geffert.

FRIENDS OF THE RURAL DEVELOPMENT LOAN FUND, 2025 I St. N.W., Washington, D.C. 20006. Filed for self 6/10/85. Legislative Interest — "To help rural development organizations improve the administrative and regulatory operation of the Rural Development Loan Fund."

HALT INC. AMERICANS FOR LEGAL REFORM, 201 Massachusette Ave. N.E., Washington, D.C. 20001. Filed for self 6/20/85. Legislative interest — "... FTC re-authorization (S 1714, HR 2970) in favor ... tort reform (S 44 Uniform Product Liability Act) opposed ... HR 3175 Occupational Disease Compensation Act, In favor ... Crime victim's compensation act (HR 3498) in favor ... D.C. small claims court increased jurisdictional ceiling increase (S 6007) in favor." Lobbyist — Wilson Reynolds.

DAVID M. HIGGINS, 333 S. Grand Ave., Los Angeles, Calif. 90071. Filed for self 6/5/85. Legislative interest — "Protection of interests of recipients of compensation excludable under section 104 of Internal Revenue Code and section 130 of the Internal Revenue Code."

L5 SOCIETY, 1060 E. Elm, Tucson, Ariz. 85719. Filed for self 6/14/85. Legislative Interest — "National Aeronautics and Space Administration Authorization Act, 1986, HR 1714." Lobbyist — Sandra Lee Adamson, P.O. Box 44026, Washington, D.C. 20026.

PLANNED PARENTHOOD FEDERATION OF AMERICA INC., 2010 Massachusette Ave. N.W., Washington, D.C. 20036. Filed for self 6/13/85. Legislative interest — "General health legislation as it pertains to family planning and reproductive health, also legislation pertaining to regulations or restrictions upon the rights of individuals to exercise choice and individual discretion on matters of personal health and reproduction. Also tax, budget and appropriations affecting the operations of nonprofit 501(c)3 corporations." Lobbyist — Ronald James Fitzsimmons.

RAUSCHENBERG OVERSEAS CULTURAL INTERCHANGE, Tampa, Fla. Lobbyist — Gray & Co., 3255 Grace St. N.W., Washington, D.C. 20007. Filed 6/26/85. Legislative Interest — "Including but not limited to seeking legislation to amend the Arts and Artifacts Indemnities Act of 1975."

SOLAR LOBBY, 1001 Connecticut Ave. N.W., Washington, D.C. 20036. Filed for self 6/24/85. Legislative interest — "... To promote the use of renewable energy sources ... HR 2001, S 1220 ... for both bills." Lobbyist — William Holmberg

July Registrations

Corporations and Businesses

AEROJET-GENERAL INC., Sacramento, Calif. Lobbyist — Heron, Burchette, Ruckert & Rothwell, 1025 Thomas Jefferson St. N.W., Washington, D.C. 20007. Filed 7/10/85. Legislative interest — "... proposed amendments to the 'Superfund' Law ... Superfund Improvement Act of 1985 ... S 51 ... U.S.C. 9601 et seq. ... modification."

H. F. AHMANSON & CO., Los Angeles, Calif. Lobbyist — Riddell, Holroyd & Butler, 1331 Pennsylvania Ave. N.W., Washington, D.C. 20004. Filed 7/29/85. Legislative interest — "The President's Tax Proposals and the effect of any legislation on thrift institutions."

AMERICAN AUTOMAR CORP., Washington, D.C. Lobbyist — Bowman, Conner, Touhey & Petrillo, 2828 Pennsylvania Ave. N.W., Washington, D.C. 20007. Filed 7/29/85. Legislative Interest — "Taxation of lessors of foreign-built U.S. flag ships ... Internal Revenue Code of 1954 ... 26 U.S.C. Section 861 (d)...."

AMERICAN CYANAMID CO., Washington, D.C. Lobbyist — Murray & Scheer, 2550 M St. N.W., Washington, D.C. 20037. Filed 7/17/85. Legislative interest — Not specified.

AMERICAN ELECTRONIC LABORATORIES INC., Lansdale, Pa. Lobbyist — Dawson Mathis & Associates, 1800 M St. N.W., Washington, D.C. 20036. Filed 7/12/85. (Former U.S. Rep. Dawson Mathis, D-Ga., 1971-81, was listed as agent for this client.) Legislative interest — "Defense authorizations and appropriations."

AMERICAN GENERAL CORP., 2929 Allen Parkway, Houston, Texas 77019. Filed for self 7/24/85. Legislative interest — "... Tax proposals relating to insurance and retirement savings ... Financial services deregulation including HR 20 ... Insurance risk classification ... Securities regulation...." Lobbyist — William C. Phelps.

AMERICAN PETROFINA INC., P.O. Box 2159, Dallas, Texas 75221. Filed for self 7/8/85. Legislative interest — "... House Appropriations bill for Commerce, State, and the Judiciary, and any and all amendments which relate to construction differential subsidies for ships." Lobbyist — Gary W. Bruner.

ANDERSON, HIBEY, NAUHEIM & BLAIR, Washington, D.C. Lobbyist — Charles G. Hardin Associates Inc., 815 Connecticut Ave. N.W., Washington, D.C. 20006. Filed 7/2/85. Legislative interest — "... airport funding and fees."

ARCHER DANIELS MIDLAND CORP., Decatur, Ill. Lobbyist — Mark A. Siegel & Associates, 400 N. Capitol St., Washington, D.C. 20001. Filed 7/24/85. Legislative interest — Not specified.

ASARCO INC., New York, N.Y. Lobbyist — Gray & Co., 3255 Grace St. N.W., Washington, D.C. 20007. Filed 7/10/85. Legislative interest — "... the copper industry." Lobbyist — Heron, Burchette, Ruckert & Rothwell, 1025 Thomas Jefferson St. N.W., Washington, D.C. 20007. Filed 7/10/85. Legislative Interest — "... proposed amendments to the 'Superfund' Law ... Superfund Improvement Act of 1985 ... S 51 ... U.S.C. 9601 et seq. ... modification."

ASUNTOS INTERNACIONALES A.C., Mexico City, Mexico. Lobbyist — Arnold & Porter, 1200 New Hampshire Ave. N.W., Washington, D.C. 20036. Filed 7/16/85. Legislative interest — "Against proposals which would change the U.S. countervailing duty law to treat Mexico's pricing of oil and gas products as a countervailable subsidy."

BEAR WEST CO. INC., Salt Lake City, Utah. Lobbyist — Dennis J. Earhart, 2001 Wisconsin Ave. N.W., Washington, D.C. 20007. Filed 7/17/85. Legislative interest — "Clean Air, public land policy, and coal leasing. ..."

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

JEAN CLAUDE MARQUIS, INNOCENT DESIR, MICLISE OCSUIS, EDVAR NICHOLAS, WILFRED PIERRE, HUBERT DELVA, LUC AFRICAIN, MISIUS TANUS, KESNEL OLIBRICE, PRENANCE SOMMERVILLE, JEAN CLAUDE MADEL, VALET CHARLES, WILNOR VALSAINT, PAUL CALIXTE, SAUVEUR ATILUS, MERILIEN PIERRISAINT, SOELLE D'AFINICE, FRISNER SENTIL, PIERRE PETIT-DOR, OSIJEAN SAINT FORT, and all others similarly situated,	*	
Plaintiffs	*	C.A. No.85-8388 CIV-GONZALEZ
v.		
UNITED STATES SUGAR CORPORATION, ATLANTIC SUGAR ASSOCIATION, GULF AND WESTERN FOOD PRODUCTS, CO., OSCEOLA FARMS CO., SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, CANE CONTRACTORS INC., SUGAR CANE HARVESTING, INC., SHAWNEE FARMS, INC., OKEELANTA CORP., and FLORIDA FRUIT AND VEGETABLE ASSOCIATION,	*	FIRST AMENDED COMPLAINT
	*	CLASS ACTION Jury Demanded
Defendants	*	

Introductory Statement

1. Plaintiffs, twenty United States farm workers, complain of various unlawful employment practices designed by Defendants to exclude United States farm workers from employment in the Florida sugarcane harvest so that Defendants can unlawfully import foreign workers to harvest their cane. Defendants' unlawful employment practices consititute violations of the

6. imposing productivity standards on U.S. workers without disclosing the existence of such a standard and without disclosing the specific standard imposed;

7. failing to comply with the disclosure requirements of AWPA and the terms of the working arrangement as defined by AWPA; and

8. failing to comply with the requirements of the Wagner-Peyser Act and the regulations promulgated thereunder.

D. Award Plaintiffs and their class damages as follows:

1. treble damages for the injury they have suffered result of Defendants' violations of the Sherman Act and the Florida Anti-Trust Act;

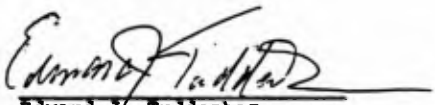
2. statutory or actual and punitive damages for Defendants violations of FLCRA and AWPA;

3. actual and punitive damages for Defendants' violations of the Wagner-Peyser Act, 42 U.S.C. ""1981 and 1985, and breach of contract.

E. Award Plaintiffs their costs, and reasonable attorneys fees.

F. Award such other relief as this Court deems just and proper.

Respectfully submitted,



Edward J. Tuddenham
Kristine Poplawski
FARMWORKER JUSTICE FUND
2001 "S" St. N.W. Suite 312
Washington, D.C. 20009
(202) 462-8192

EXHIBIT D

AUTHORIZATION FOR RELEASE
OF INFORMATION

I hereby authorize any and all my employers in the United States to release any and all information relating to my employment in the United States (including records showing my earnings, piece-rate units earned, withholdings from wages and net wages) to Gregory S. Schell of the Legal Aid Bureau, Inc., Edward J. Tuddenham of the Migrant Legal Action Program, Inc., Robert N. Moore of Pine Tree Legal Assistance or any attorneys or support personnel working in conjunction with them. I wish this information to be released so that these individuals may make certain that all moneys due me under various court actions involving the adverse effect wage rate and piece-rate to be paid for my work in the United States are properly deposited in court-ordered bank accounts. I have been told that these cases include the following actions:

Florida Fruit & Vegetable Assoc. v. Donovan
Shoreham Cooperative Producers Assoc. v. Donovan
Virginia Agricultural Growers Assoc. v. Donovan
Frederick County Fruit Growers Assoc. v. Brock

6-9-86
Date

signed copy
but signature
whited out to
protect worker
privacy.

A0 88 (Rev. 5/85) Deposition Subpoena EXHIBIT F

United States District Court

SOUTHERN DISTRICT OF FLORIDA

NAACP, JEFFERSON COUNTY BRANCH, ET AL.,

4996

V.

DEPOSITION SUBPOENA

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

CASE NUMBER: (DISTRICT OF COLUMBIA) CIVIL ACTION NO. 82-2315

TYPE OF CASE: ☒ CIVIL ☐ CRIMINAL

SUBPOENA FOR: ☒ PERSON ☒ DOCUMENT(S) or OBJECT(S)

TO:
SUGAR CANE GROWERS COOPERATIVE
Post Office Box 666
Belle Glade, Florida 33430

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE	DATE AND TIME
OFFICES OF FLORIDA RURAL LEGAL SERVICE, INC. 572 S.W. 2nd Street Belle Glade, Florida 33430	MARCH 17, 1987 2:00 P.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

Pursuant to F.R. Civ. P. 30 (B)(6), Sugar Cane Growers Cooperative is directed to designate a person or persons to appear and testify on its behalf about the following matters;

1. The methodology used by Sugar Cane Growers Cooperative to set row prices for harvest and seed cane.
2. The methodology used by Sugar Cane Growers Cooperative to set the length and price of the daily task in harvest and seed cane.

☒ *Please see additional information on reverse*

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30(b)(6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and setting forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
Robert M. March	FEB 2 5 1987
(BY) DEPUTY CLERK	

This subpoena is issued upon application of the: ☒ Plaintiff ☐ Defendant ☐ U.S. Attorney

QUESTIONS MAY BE ADDRESSED TO:
Edward J. Tuddenham
Migrant Legal Action Program, Inc.
2001 S Street, N.W. Suite 310
Washington, D.C. 20009
ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER

*If not applicable, enter "none"

EXHIBIT F

Migrant Legal Action Program, Inc.

2001 S Street, N.W.
Suite 310
Washington, D.C. 20009
Telephone: (202) 462-7744

March 5, 1987

Mr. Robert M. March
Clerk of Court
United States District Courthouse
299 East Broward Boulevard
Ft. Lauderdale, FL 33301

Re: Florida Fruit and Vegetable Association v. Brock
CA 83-8470-CILV-JAG

Dear Mr. March:

Enclosed for filing in the above referenced case please find an original and copy of the following documents:

1. Motion To Intervene As Of Right For Purposes Of Implementing The Judgment

2. Intervenors' Membrandum In Support Of Motion To Intervene

3. Proposed Order

I have enclosed self-addressed stamped envelopes to all attorneys of record.

Thank you for your attention to this matter.

Sincerely,

Edward J. Tuddenham

cc: Ann-Margaret Pointer
Charles Caulkins
Charles Kelso
Leslie Shedlin
Christopher D. Robinson
Garry Geffert

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

FLORIDA FRUIT AND VEGETABLE ASSOCIATION, et al.,	*	
Plaintiffs	*	No. 83-8470-CIV-GONZALEZ
v.	*	
WILLIAM E. BROCK, et al.,	*	
Defendants	*	MOTION TO INTERVENE AS OF RIGHT FOR PURPOSES OF IMPLEMENTING THE JUDGMENT
and	*	
JOSE RAMIREZ, et al.,	*	
Defendant-Intervenors	*	

Now come Jose Ramirez, Francisco Ruiz, Aniceto Carrizalez, Jacob Powell, and Antonio Moliere and move this Court pursuant to Rule 24(a)(2) for leave to intervene as of right in this action on behalf of themselves and the following class:

> All workers who are beneficiaries of the letters of credit established in this action to secure payment of the ES-202 adverse effect wage rate.

Intervenors seek to intervene to protect their interests in the proper calculation and distribution of the back adverse effect rate (AEWR) wages due to farm workers as a result of the judgment in this action.

In support of this motion Intervenors refer the Court to their memorandum accompanying this motion which shows that:

their interests in the wages secured by those letters of credit.

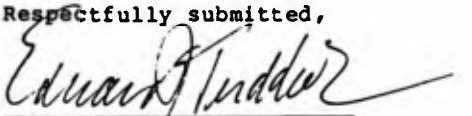
5. The Department of Labor does not have the resources nor the ability to represent Intervenors interests. Intervenors as beneficiaries of the letters of credit are entitled to their own attorney to represent their interests.

6. This application for intervention for purposes of implementing the judgment is timely since the judgment did not become final until May 1986 and it was not until January 1987 that the effectiveness of the intervention of Ramirez, Ruiz, and Carrizalez was challenged by Plaintiffs.

7. Because Intervenors seek to intervene solely for purposes of implementing the judgment, no prejudice to other parties to the action will occur as a result of intervention at this stage in the proceedings.

8. The interests of justice will be served by granting this motion.

Respectfully submitted,



Edward J. Tuddenham
Migrant Legal Action Program
2001 S St. NW #310
Washington, D.C. 20009

Garry G. Geffert
West Virginia Legal Services
P.O.Box 1898
Martinsburg, West Va. 25401

ATTORNEYS FOR CARRIZALEZ, RAMIREZ, RUIZ, AND MOLIERE

Kristine Poplawski
Farmworker Justice Fund, Inc.
P.O.Box 53285
Washington, D.C. 20009

ATTORNEY FOR POWELL

CERTIFICATE OF SERVICE

I, Edward Tuddenham, hereby certify that on this 6 day of March, 1987, I served the foregoing document on all parties by mailing copies first class mail to the following:

Charles Kelso
Ann Margaret Pointer
Fisher & Phillips
3500 First Atlanta Tower
Atlanta, Georgia 30383

Leslie Shedlin
U.S. Dept. of Justice
Federal Programs Branch
Civil Division Rm 3343
10th & Pennsylvania Ave. NW
Washington, D.C. 20530

Charles Caulkins
Fisher and Phillips
The Landmark Building
Suite 2500
One Finanacial Plaza
Ft. Lauderdale, Fla. 33394

Edward Tuddenham

EXHIBIT G

FARMWORKER JUSTICE FUND, INC.
2001 S Street, N.W., Suite 312
P.O. Box 53285
Washington, D.C. 20009
(202) 462-8192

July 23, 1987

David L. Ross, Esq.
Greenberg, Traurig, Askew, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1401 Brickell Avenue, ph-1
P.O Box 012890
Miami, FL 33131

Re: Marquis v. U.S. Sugar

Dear David:

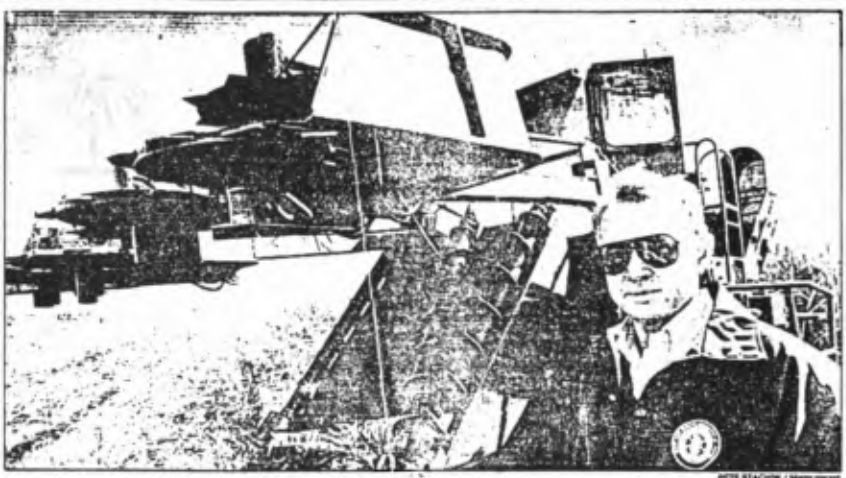
Enclosed please find several brief discovery requests. If you need any clarification of the requests or have any questions as to their scope please give me a call.

Sincerely,

Edward J. Tuddenham

cc: Kristine Poplawski
James Green
Charles S. Caulkins
James M. Gann
Charles Kelso
Gerald A. Martin
Jeffrey J. Ward

THE MIAMI HERALD - Sunday, Dec. 27, 1987



PETE STACHIW / Miami Herald

THE COMPETITION: Bill Kramer of the Florida Sugarcane Growers Association shows one of the automatic cutters.

Mechanical cutters harvest new woes for cane workers

By ELLEN McGARRAHAN
Herald Staff Writer

BELLE GLADE — The earth is shaking in certain sugarcane fields. It's subterranean thunder, rolling underground this year with the mechanization of the harvest.

The boggy muck soils of Palm Beach County cane land have long been called inhospitable to the heavy harvesting machinery. But this year, for the first time, the Sugarcane Growers Cooperative of Florida — whose mill pours white smoke into the sky on the edge of this hard-bitten town — is using machines to harvest more than half its crop.

That's over a million and a half tons of sweet stalk no longer harvested by hand. It has cost 900 men their jobs with the cooperative.

"We have a heavy heart, talking about 900 people not getting jobs anymore," said Bill Kramer, general manager of the cooperative. "It's an unfortunate side to going mechanical."

But the move to mechanization has resulted, ironically, from the barrage of lawsuits brought against the giant sugar companies by legal agencies sworn to defend the workers and make sure they are treated fairly, Kramer and others said.

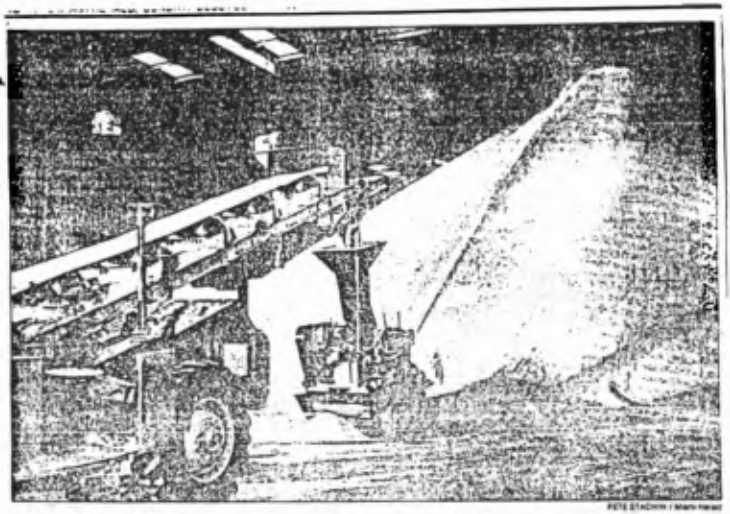
"If they would do things right," responds Rachel Ballard of Florida

PLEASE SEE CANE, 4C

PETE STACHIW / Miami Herald

UNCERTAIN FUTURE: Cane cutters like Ricky Ceylon Buckley, a Jamaican who lives in Florida during harvest season, are being replaced by mechanical cutters in many fields.

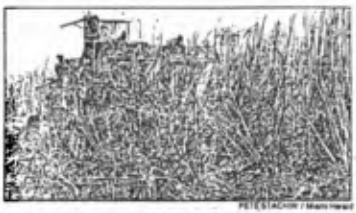
EXHIBIT H



PETE STACKPOLE / Miami Herald

THE FINAL STEP: Processed sugar is warehoused until its move to the refiner.

Mechanical cutters sweeten business, but sour workers



PETE STACKPOLE / Miami Herald

A DRAWBACK: The automatic cutters pick up more matter than just sugarcane.

CANE, *FROM* 1C

Rural Legal Services. "we wouldn't have to sue them. They could just spend the money they spend on legal fees and just start to pay people right."

For more than 40 years, sugarcane in Palm Beach County has been hand-cut by West Indian workers brought over by the cane companies for the six-month harvest and returned to the islands after the season is done.

Scrutiny, lawsuits

For all of those years, the living and working conditions of the West Indians have been subject to scrutiny — and lawsuits. Lawyers from Florida Rural Legal Services and other agencies have filed suit after suit on behalf of the foreign workers, charging the big sugar companies with, among other things, under-paying and illegally blacklisting the men.

Last year, for example, Florida Rural Legal Services sued the Okeelanta Corp., a South Bay-based cane grower, on behalf of 143 cane cutters first and summarily deported after protesting their working conditions.

"Our job is to represent farm workers in situations where they are being improperly paid," said Ballard, one of Legal Services' sugarcane experts. "Every single sugarcane worker I've ever talked to said he's not being paid properly."

Now some sugar companies say that pressure from Florida Rural Legal Services, combined with the rising costs of the foreign worker program, is making mechanization look better and better.

Bitter battle

And both sides are bitter in this battle.

"I think they've probably had minds to harass us and add costs to the program," said Roy Campbell, the cooperative's personnel manager. "And to some extent, they've been successful."

"Every single grower, every single farmer, that has ever been sued by Legal Services and then later had financial problems he had to change in any way always accuses the suit," said Ballard. "It will be unfair if a lot of workers get cut out of jobs that they do want and need just because we're asking that they be paid properly."

Each of the approximately 9,000 West Indian workers brought to Florida to cut cane each year for the season can expect to earn about $5,000 to $6,000, both Campbell and Ballard said. Minimum wage for what the men make is set at $5.30 an hour.

From the money they make each day, $6 is taken out for food, another 1 to 2 percent is taken out for insurance, and 23 percent is sent back home to sit in no-interest accounts until the season is done. Rooms in the company-barracks are provided free.

Work is needed

One thing neither the cane companies nor Legal Services dispute is that the men need — and want — the work.

With unemployment high and wages low in Jamaica and other West Indian islands, the cane cutters can make in six months in Florida what it would take several years at home to earn, said Robert Bukar Jr., vice president for corporate affairs at U.S. Sugar, the Glades' largest single sugar corporation.

"They're very anxious to come here," said Kramer.

"The guys are just crazy to be able to come over here," agreed Ballard, "but that's not because it's such a great job. It's because it's the only option available to them."

Mechanical harvesting of sugarcane is not new. Machines have been available to Glades growers for more than a decade. Since the mid-1870s, the sugarcane industry has harvested about 35 percent of its crop with machines, said Barbara Miedema, spokeswoman for the Florida Sugarcane League.

Soil differs

But until recently, most of the mechanical harvesting has been done in areas with sandy soils, where cane grows straighter than in muck soils and is therefore more suitable for machine harvest, she said. In muck soils, the machines have tended to uproot sugarcane as they cut it, which costs growers money for replanting, she said.

And because of the intricacies of sugarcane processing, cane cut by machines costs more to turn to raw sugar than cane cut by hand, Kramer said. A man with a cane knife can slice very precisely, choosing only the most sucrose-laden part of the plant. A machine is less exact, and includes more of the grassy top part of the cane plant in the harvest.

The grassy parts, called "trash" in the industry, act as sponges during the processing, soaking up some of the sucrose that otherwise would be crystallized into sugar. That costs growers money, and it's money many growers would rather not spend.

But two years ago, the cooperative began to use mechanical harvesting as a way of saving money, Kramer said.

Legal pressures

Kramer said the cooperative decided to expand its mechanical harvesting program because it felt the future of the foreign worker program was uncertain, due to the legal pressures on the program. And, he said, the costs associated with having men to cut cane are increasing: costs for everything from workers compensation to transportation to maintaining the company housing.

"It's a little of everything," he said.

In 1987, the cooperative harvested about one-third of its crop with machines. The rest of the cutting was done by 1,700 West Indian workers. In 1988, machines cut half the crop, and 1,400 men cut the rest, Kramer said. This year, machines are cutting two-thirds of the cane, and only 800 hand-cutters were hired.

"We'll lose less in the mill than we keep in the fields," Kramer said. And, he said, "there's great uncertainty about the [foreign worker] program. It is under attack."

At U.S. Sugar, Bukar said the Glades giant is not going to increase its mechanical harvesting program in the near future. Right now, U.S. Sugar takes in about 40 percent of its crop with machines, which operate almost exclusively on sandy soils, he said.

"We feel it does not work well on muck soils," he said.

But the cooperative is confident it's on the right track.

"We're on the cutting edge right now," said personnel manager Campbell. "We've moved ahead as fast as we could."

And all of it leaves Florida Rural Legal Services with a sour taste.

"If the motivation in that they see they may have to pay people more money, if it's been cheaper to use people," said Ballard, "I think that says something about the job itself and whether there's any point in having people employed in a situation where they're not being paid right."

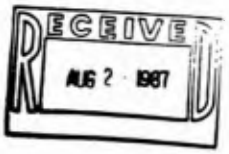
Migrant Legal Action Program, Inc.

2001 S Street, N.W.
Suite 310
Washington, D.C. 20009
Telephone: (202) 462-7744

EXHIBIT I

272

August 25, 1987



Clerk
United States District Court
District of Columbia
3rd and Constitution Avenues, N.W.
Washington, D.C. 20001

Re: AFL-CIO, et al. v. William Brock, et al., and National Council of Agricultural Employers, et al., and American Farm Bureau Federation C.A. No. 87-1683-SS

Dear Clerk:

Enclosed for filing in the above-referenced case please find an original and one copy of "Plaintiffs' Motion for Hearing on Piece-Rate Issue."

Thank you for your attention to this matter.

Sincerely,

Edward J. Tuddenham

cc: Richard K. Willard
Joseph E. DiGenova
Sandra M. Schraibman
Drake Cutini
Charles D. Raymond
Robert Lesnick
Carl W. Vogt
Warren Belmar
John Simpson
Robert A. Burgoyne
Kathryn A. Oberly
Michael F. Rosenblum
Patricia A. McCoy
David Silberman
Garry G. Geffert
Shelley Davis

EXHIBIT J

FARMWORKER JUSTICE FUND, INC.
2001 S Street, N.W., Suite 312
P.O. Box 53285
Washington, D.C. 20009
(202) 462-8192

DLR

December 11, 1987

Mr. David Ross, Esq.
Greenberg, Traurig, Askew,
Lipnff, Rosen & Quentel, P.A.
1401 Brickell Ave.
P.O. Box 021890
Miami, FL 33131

RE: Marquis et al. v. U.S. Sugar Corp., et al.,
C.A. No. 85-8308

Dear Mr. Ross:

Enclosed please find answers to Interrogatory No. 1 of Defendants' Interrogatories Regarding Class Certification from Plaintiffs Paul Calixte, Joseph "Misius" Tanus, Jean Claude Marquis, Osicene Saint Fort, Atilus Sauveur and Wilnor Valsaint. Answers will follow shortly from Plaintiffs Soelle D'Afinice, Luc Africain, Innocent Desir, and Jean Claude Madel. We have information that Plaintiffs Valet Charles and Edver Nicholas are deceased. We have not yet been able to communicate with the remaining Plaintiffs, although we are in the process of arranging long-distance interviews with several of them.

Also enclosed please find Plaintiffs' Supplemental Response To Defendants' First Request for Production of Documentation.

Sincerely,

Kristine Poplawski

cc: Ann-Margaret Pointer, Esq.
Charles Kelso, Esq.
Charles Caulkins, Esq.

EXHIBIT "A"

EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

JEAN CLAUDE MARQUIS, INNOCENT DESIR, MICLISE OCSUIS, EDVAR NICHOLAS, WILFRED PIERRE, HUBERT DELVA, LUC AFRICAIN, MISIUS TANUS, KESNEL OLIBRICE, PRENANCE SOMMERVILLE, JEAN CLAUDE MADEL, VALET CHARLES, WILNOR VALSAINT, PAUL CALIXTE, SAUVEUR ATILUS, MERILIEN PIERRISAINT, SOELLE D'AFINICE, FRISNER SENTIL, PIERRE PETIT-DOR, OSIJEAN SAINT FORT, and all others similarly situated,	
Plaintiffs,	C.A. No. 85-8388 CIV-GONZALEZ
v.	
UNITED STATES SUGAR CORPORATION, ATLANTIC SUGAR ASSOCIATION, OSCEOLA FARMS CO., SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, CANE CONTRACTORS INC., SUGAR CANE HARVESTING, INC., SHAWNEE FARMS, INC., OKEELANTA CORP., and FLORIDA FRUIT AND VEGETABLE ASSOCIATION,	SECOND AMENDED COMPLAINT
	CLASS ACTION Jury Demanded
Defendants.	

INTRODUCTORY STATEMENT

1. Plaintiffs, 20 United States farm workers, complain of various unlawful employment practices, especially those designed by Defendants to exclude United States farm workers of Haitian ancestry from employment in the Florida sugar cane harvest so that Defendants can unlawfully import foreign workers to harvest their cane. Defendants' unlawful employment practices constitute violations of the Sherman Anti-Trust Act, 15 U.S.C. §§1 and 2;

§1391(b) and (c) in that all Defendants are either incorporated in Florida and/or doing business in the West Palm Beach Division of the Southern District of Florida, and the claims arose in that division and district.

Plaintiffs

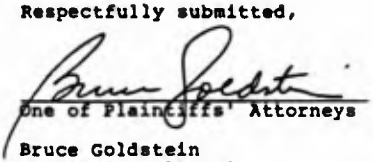
5. Plaintiffs Jean Claude Marquis, Innocent Desir, Edvar Nicholas, Wilfred Pierre, Miclise Ocsuis, Hubert Delva, Luc Africain, Misius Tanus, Kesnel Olibrice, Prenance Sommerville, Jean Claude Madel, Valet Charles, Wilnor Valsaint, Paul Calixte, Sauveur Atilus, Merilien Pierrisaint, Soelle D'Afinice, Frisner Sentil, Pierre Petit-Dor, and Osijean St. Fort are migrant and seasonal farm workers who reside in Florida.

6. All Plaintiffs are U.S. workers as that term is defined by 20 C.F.R. 655.200(b), and have been U.S. workers at all times relevant to this action. Denied

7. All Plaintiffs are of Haitian ancestry and ethnic characteristics. All of the plaintiffs speak Creole and little or no English.

8. At all times relevant herein, all Plaintiffs have been and/or continue to be desirous of employment as sugar cane harvesters and have been and are ready, able, and willing to perform such work for Defendants.

Respectfully submitted,



Date: April 14, 1988

One of Plaintiffs' Attorneys

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Washington, D.C. 20009
(202) 462-7744

PLAINTIFFS' ATTORNEYS

CERTIFICATE OF SERVICE

I, Bruce Goldstein, hereby certify that on the 14th day of April, 1988, I served the foregoing document upon counsel for defendants by mailing a copy, postage prepaid, to the following address:

Charles S. Caulkins, Esq.
Fisher & Phillips
The Landmark Building
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Fort Lauderdale, FL 33394

David L. Ross, Esq.
Andres Rivero
Greenberg, Traurig, Askew, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1401 Brickell Avenue, ph-1
P.O. Box 012890
Miami, FL 33131

Charles Kelso, Esq.
Ann-Margaret Pointer, Esq.
Fisher & Phillips
3500 First Atlanta Tower
Atlanta, Georgia 30383

Bruce Goldstein

EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAACP, JEFFERSON COUNTY BRANCH, et al.,	*	
Plaintiffs,	*	
v.	*	
THE HONORABLE ELIZABETH DOLE, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, IN HER OFFICIAL CAPACITY, et al.,	*	C.A. No. 82-2315-CRR
Defendants	*	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE

Plaintiffs have moved to strike the Comments of the Farmworker Justice Fund ("FJF"), Exhibit 16 to the Reply Memorandum in Support of Intervenor-Defendants' Motion for Protective Order ("Intervenors' Reply Memo"), because FJF is a stranger to this litigation. In response, intervenors claim that the FJF's comments are relevant because its attorneys are plaintiffs' "colleagues" and FJF attorneys are one of the counsel for plaintiffs in Marquis v. U.S. Sugar Corp. Intervenors' contentions are nonsensical and demonstrate the irrelevance of that exhibit to these proceedings.

1. Intervenors describe the Farmworker Justice Fund as "plaintiffs' colleagues" in an attempt to concoct a relationship between the two where none exists. The Farmworker Justice Fund does not represent any of the NAACP plaintiffs in any context. Rather, it represents twelve

individual farmworkers in Marquis v. U.S. Sugar Corp., C.A. No. 85-8388 (S.D. Fla.). None of the NAACP plaintiffs are named plaintiffs in Marquis. While FJF may someday represent a class of farmworkers in Marquis, no such class has yet been certified. Thus, the Farmworker Justice Fund is a stranger to this litigation and its Comments are simply irrelevant.

2. Second, the Farmworker Justice Fund filed the comments in question in a rulemaking to determine whether sugarcane is a "perishable commodity" within the meaning of the Special Agricultural Worker and Replenishment Agricultural Worker provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). These comments were filed by the Farmworker Justice Fund on its own behalf, and not on behalf of the plaintiffs in this action. Since there is no connection between the NAACP plaintiffs and those comments, the Comments should be stricken from the record.

3. Finally, the sentence in the Comments upon which intervenors appear to rely1/ merely states the sugarcane companies' description of its pricing system -- not FJF's. Thus, the comments do not show that "plaintiffs' lawyers (or their colleagues)" have taken a contradictory position in another proceeding. See Intervenors' Reply Memo at 4.

1/ "These very factors are cited by Florida growers as reasons why the determinations of the price to be paid for canecutter labor to harvest a particular field cannot be made more than one or two days before the harvest of that field." FJF Comments at 10, cited at Int. Reply Mem. at 5.

CONCLUSION

For the reasons stated above and in Plaintiffs' Motion to Strike, the Comments of the Farmworker Justice Fund, Ex. 16 to Int. Reply Mem., should be stricken from the record.

Respectfully submitted,

Shelley Davis
D.C. Bar No. 413311
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Washington, D.C. 20009
(202) 462-7744

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(813) 657-3681

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Of Counsel:

William Stein, Esq.
HUGHES HUBBARD & REED
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6240

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAACP, JEFFERSON COUNTY BRANCH, et al.,	*	
Plaintiffs,	*	
v.	*	
THE HONORABLE ELIZABETH DOLE, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, IN HER OFFICIAL CAPACITY, et al.,	*	C.A. No. 82-2315-CRR
Defendants	*	CERTIFICATE OF SERVICE

I, Shelley Davis, hereby certify that on this 20th day of February, 1990, I served copies of "Plaintiffs' Reply Memorandum in Support of Their Motion to Strike" by first class mail upon the following counsel of record:

Michael J. Ryan
Asst. U.S. Attorney
Judiciary Building
U.S. Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20001

Harry L. Sheinfeld
U.S. Department of Labor
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

John M. Simpson
Fulbright & Jaworski
1150 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036

Shelley Davis

EXHIBIT M

EXCERPTS FROM HEARING

OF

COTTON, RICE AND SUGAR SUBCOMMITTEE

HOUSE AGRICULTURE COMMITTEE

HELD IN CLEWISTON, FLORIDA

FEBRUARY 2, 1990

By Rep. Edward Madigan

Rep. Madigan: Mr. Secretary, could you tell me the average annual wage of a worker in Jamaica?

By Mr. A. G. Irons, Permanent Secretary, Ministry of Labour, Jamaica

Sec. Irons: Well sir, if he were working in agriculture, he would average about 22 Jamaican dollars a day.

Rep. Madigan: What is that in U.S. equivalent?

Sec. Irons: That would be the equivalent of $3.10.

Rep. Madigan: And one that comes here and works in the sugar cane fields would earn how much a day?

Sec. Irons: The minimum wage, I believe, is $5.35, so for an eight hour day, it would average over $40.00 a day, I would think, based on that rate.

Rep. Madigan: $40.00 a day here versus $3.10 a day in Jamaica?

Sec. Irons: Right.

Rep. Madigan: So it's a very good program for you as well as for us?

Sec. Irons: Quite true, quite true, Sir.

Rep. Madigan: We'll do everything we can to continue it.

Cotton, Rice and Sugar Subcommittee Hearing, Feb. 2, 1990

By Representative Tom Lewis

Rep. Lewis: If the sugar program was removed, how would that effect you?

Sec. Irons: It would be a very serious blow, a very serious blow.

Rep. Lewis: Would it effect your economy?

Sec. Irons: It would effect the economy of Jamaica severely.

By Representative Clyde Holloway

Rep. Holloway: Mr. Secretary, the 10,000 workers that come to Florida to work during the winter months, when they go back to Jamaica, they are unemployed, am I correct, or maybe some of them work, but most of them--

Sec. Irons: The vast majority would be unemployed.

Rep. Holloway: So, without these 10,000 jobs, you would have 10,000 more people basically on unemployment or without jobs anyhow?

Sec. Irons: Quite right.

Mr. FRANK. When you said before you had to tell your president you didn't have a political stable work force. In other words, you meant not that the individuals themselves were unstable, but that because of political conditions it would be hard to get a work force that was—I mean, you weren't talking about the politics of the workers?

Mr. WARD. Not necessarily just political, either, when I say——

Mr. FRANK. You used the phrase "politically"—you couldn't get a politically stable work force. I just want to make clear, you weren't talking about ideological unreliability among the workers; you were talking about political conditions that made it hard to get the workers; is that it?

Mr. WARD. Right.

Mr. FRANK. OK.

Mr. Cureton.

STATEMENT OF JERALD R. CURETON, ESQ., OF BLANK, ROME, COMISKY & McCAULEY, PHILADELPHIA, PA, ON BEHALF OF PENNSYLVANIA FARMERS ASSOCIATION

Mr. CURETON. Thank you, Mr. Chairman, for the opportunity to testify before the committee today.

I am a partner in the law firm of Blank, Rome, Comisky & McCauley in Philadelphia, PA. I have been practicing labor and employment law for 17 years. My practice includes a wide diversity of industries and clients that I represent.

But approximately 10 years ago, I handled my first agricultural labor case in the State of New Jersey. Since then, my involvement with the farming community has grown and now I represent a great number of farming clients in both New Jersey and Pennsylvania.

My purpose here is not to attack Legal Services Corporation or the idea of federally funded legal services for disadvantaged Americans. My purpose here is to alert you to abuses that I have witnessed personally, and members of my staff have witnessed, in dealings with certain LSC grantees.

Let me also say that those abuses are significant. They are resulting in farmers going out of business. Farmers cannot cope with and cannot afford to engage in rampant and needless litigation that is going on in the area that I am from.

The result, as I said, is that farmers are selling their farms to land developers. Other farmers are turning over their vegetable and fruit crops which utilize a great deal of migrant farmworkers, and are going to crops such as soybeans, which are not labor-intensive.

A number of farmers are also turning to mechanical harvesting devices to avoid using migrant farmworkers. And the reason for that, the sole reason for that, in many cases, is the fear of being attacked and victimized by LSC grantees who raise unrealistic and exorbitant settlement demands and put the farmer in the position of having to litigate extensively, which he cannot afford or alternatively to settle, which he cannot afford.

The real victims, in addition to the growers and the family farmers that I represent, are the workers themselves, who are put out

of work. There are fewer jobs using migrant workers in Pennsylvania today than there were in the past, and the same is true in the State of New Jersey.

One of the things I do in the farming community is educate farmers about these laws. In the last 10 years, the farming community has come a great way. The farmers I see—and literally hundreds of farmers I've seen in the two States that I am involved in—are anxious to learn about the laws that affect their work force. They are anxious to comply with those laws. We give educational courses periodically to these people.

So what has happened is that this conventional wisdom that appears to be bandied about that farmers are abusing workers is just that—a conventional wisdom—and it's not true. Sure, I suspect that there are isolated instances in this day and age of growers who may abuse workers. That is probably true in every industry. But the vast majority of growers are honest, hard working, good people who are attempting to comply with these laws.

What has happened, though, is that LSC has outfitted and authorized an army of grantees to go out there and fight these battles. But the battles no longer exist.

What happens when you take an army and put it in the field and there is no war? They create a war.

What we are seeing is is litigation that is needless, that is unnecessary, and that is not productive. There are none of the serious abuses that were real or perceived in the past.

Let me give you some specifics. One of the major areas that we find abuse in is solicitation of clients. I am aware of cases—of a case—where LSC grantees entered into the private rooms of workers and told the workers they were from Immigration, that they were Immigration officials. They got these workers to sign blank authorization forms in English, which is standard procedure anyway.

If a farmer tried to get a worker to sign a blank form in English without translating it to him, he would be violating MSPA and he would be in big trouble. This is exactly what the LSC grantees do.

I have taken depositions of workers who when we tell them what the lawsuit is about, they are incredulous—they cannot believe it. They say, that's not what I went to LSC for, I don't know what you're talking about.

Exhibit 1 to my prepared statement and recorded on page 3 of my document is a solicitation letter from an LSC grantee to a former worker of a grower.

In order to file a class action lawsuit against a grower, the grantee rights to the worker that, "After speaking," and I'm quoting:

"After speaking with all of the workers and after examining the receipts, we have determined that you had many problems in the . . . camp. This includes the fact that you did not receive minimum wages due to the unreasonable charges for food and other things."

This seems innocuous on its face, but the underlying facts prove otherwise. First, the grantee did not speak with all the workers. Workers have told us—told the grower—that they were not contacted, and don't know what this is about.

More importantly, they say that they have examined the receipts which demonstrates to the normal reader that they have proof of the case. The grantee never saw those receipts. The only person who has those receipts is the person who provides the food. I know this because a grantee has recently asked me for the receipts. They never saw those receipts; and yet, they misrepresented that fact to a group of migrant workers in an effort to create a lawsuit.

We've seen this where they try to keep workers once into the lawsuit, once they realize what the lawsuit's about and want out. We've had occasions where LSC grantees have gone to the worker's bedroom at 6:30 in the morning—the worker is sleeping with his girlfriend—and the LSC grantee came in and would not leave until it was time to go to work, trying to get the worker to stay in the lawsuit. The worker did not agree to do so.

Four of the grantee's employees came back after work and stayed 4 hours attempting to convince this worker to stay in the lawsuit, threatening him that the judge would be mad at him if he dropped the lawsuit.

The next area where we've seen abuse is in the litigation process itself. Lawsuits that no private litigator would prosecute are brought. Lawsuits that should be reasonably settled and that I would be interested in a reasonable settlement in are not reasonably settled, largely because of the agenda, the social agenda, of the grantee itself.

In other words, what happens is that the plaintiffs are a technicality. The plaintiffs are a necessary evil because you have to have a plaintiff in order to bring a lawsuit. Once they got the name on the lawsuit, the plaintiffs become largely irrelevant.

Some of the claims that taxpayer moneys are being spent to prosecute are pretty interesting. For example, in one case we had workers asked to signed an authorization for a lawsuit to collect unpaid wages, when in fact they had not even received the pay check yet—they had just started work, and the solicitation was made to them right then.

Some of the interesting claims that are made are the grower failed to disclose at the time of recruitment that there was a soda machine in the camp; the grower failed to disclose at the time that there was a juke box in the camp, or that the grower failed to disclose at the time of recruitment that there was a pool table in the camp.

There is no allegation there were overcharges for these services. There is no allegation that they were forced to put quarters in the juke box or forced to use the pool table. It's a technical violation—these are examples of technical violations.

Now, you may say they have a right to bring technical violations, but it doesn't stop there. What happens next is they say to the grower, it's $500 for the violation. You had a pool table, you didn't disclose it at the time of recruitment; that's $500 per worker.

Now, what happens if you have 100 workers? You're talking about $50,000 because you didn't tell them in Florida you had a pool table.

These are the type of allegations that we're seeing in lawsuits. It makes it very difficult to settle a real claim.

Perhaps the most recent case that illustrates my point is *Sharpe* v. *Roth,* recently litigated. There are some facts about that case that would be elucidating, especially in light of the statistics that were presented here earlier today.

Sharpe v. *Roth* involved an LSC grantee initiating a lawsuit on behalf of several workers at a small grower in Pennsylvania. At most, the grantee could have recovered $14,500. The grantee, in our estimate, spent over $200,000 prosecuting that case.

That's our estimate. The grantee won $3,000. The grantee submitted a bill to the court for attorney's fees of $70,000. The grantee was awarded by the court $6,000.

I have attached the court's opinion on the attorney's fees. The court says, "It is the opinion of the court that the settlement"—settlement discussions had taken place—"was effectively scuttled by plaintiff's counsel's insistence on inclusion of unrelated matters." The plaintiff's counsel, of course, was the LSC grantee.

I view the *Sharpe* v. *Roth* case as a devastating loss for both sides. Mr. Roth had to pay a great deal of attorney's fees to defend himself in this small case; the grantee had to pay, and spent thousands and thousands of dollars, in the same way. But I am sure that the *Sharpe* v. *Roth* case will show up as a victory in the statistics presented to you because in fact they recovered some money for some plaintiff.

I urge you to review the *Sharpe* v. *Roth* decision of the judge, where the LSC grantees are roundly criticized for overlitigating and overprosecuting their case.

Finally, there's the process of settlement, which is of great interest to my clients because they don't want to spend a lot of time and money litigating. The process is used as a ruse. What happens is this: A demand letter is sent. The demand letter does not name any plaintiffs and lists a great number of violations with no details.

The grantee then tells the grower that he cannot settle the case unless the grower gives him all of his books and records. And if he doesn't give him all the books and records he's going to be sued.

Many growers made the mistake of giving and turning over their books and records to the grantee; who then comes back and says: Oh, I found a whole raft of new violations, and the settlement goes up. The grower realizes he's been had. The grantee didn't have a case to begin with and just went in and ferreted out something to make a case.

One of the grantee's favorite ploys is to tell the grower, point-blank, you cannot afford to litigate against me; settle now. I think that the settlement statistics you have are misleading for that reason—growers cannot afford to litigate so they settle.

You will see a trend in the future, however—especially in my region—that settlements will not occur as they have in the past. My growers are not giving away money to these people to get rid of these cases for the simple reason that the grantees have been trained—they come back every year once they know a farmer has settled, they'll come back again and again to get more money from them.

I do not suggest that every grantee abuses the system. I do suggest that there are systemic abuses because there are no economic

controls that we have in private practice and there are no real plaintiffs to help guide and direct their interest in this litigation.

Thank you.

Mr. FRANK. Thank you. I appreciate all of that you have said.

[The prepared statement of Mr. Cureton follows:]

STATEMENT OF THE PENNSYLVANIA FARMERS' ASSOCIATION TO THE HOUSE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENT RELATIONS WITH REGARD TO LEGAL SERVICES REFORM

Presented by
Jerald R. Cureton, Blank, Rome, Comisky & McCauley

May 23, 1990

Mr. Chairman, thank you for permitting me the opportunity to share with the Committee my experience and observations of LSC grantees in the agricultural community.

I am a partner in the Philadelphia law firm of Blank, Rome, Comisky & McCauley. I have practiced labor and employment relations law for 17 years. In addition to the commercial and industrial clients I serve, for the past ten years I have represented many growers in Pennsylvania and New Jersey in connection with their labor matters. I frequently advise farmers, give educational seminars and represent them in their dealings with certain Legal Service Corporation ("LSC") grantees.

I want to share with you that the growers I have spoken with in the recent years are fearful. They have learned to cope with drought, early frost and every manner of calamitous weather; they have endured financial upheavals and government regulations. However, they do not know how to cope with, nor can they afford, rampant and needless litigation generated by certain LSC grantees. I firmly believe these grantees are a cause of the demise of the family farm. I have spoken with fruit and vegetable growers who sold their farms because they couldn't afford to pay the exorbitant sums extracted from them by grantees. I have spoken with growers who cut down their orchards and planted soybeans. Why? Because soybeans are not labor intensive, and reduce the likelihood of a visit or revisit from farmworker advocates.

The growers are not the only ones to pay a severe price; unexpectedly, the workers pay as well. The growers who turn to non-labor intensive crops do not hire workers; the growers who sell their farms to land developers do not hire workers; and the growers who resort to mechanical harvesting machines hire fewer workers. The inescapable impact on migrant and seasonal workers is fewer jobs.

The farming community has come a long way in the decade since I began representing growers. Every farmer I speak to knows about The Migrant and Seasonal Workers Protection Act ("MSPA") and The Fair Labor Standards Act ("FLSA") and the state laws that governs them. Every farmer I know tries to comply with those laws. Frankly, I won't represent a grower unless he/she is

committed to creating a positive labor relations environment and uses his/her best efforts to comply with the law.

Despite this state of greatly improved affairs, the LSC armies are still in the field. What are they doing? We all know what armies without a war or a battle do: They go create one.

With fewer, if any, major cases of abuse to address, this army of LSC grantees knit-pick the farm labor statutes and bring trumped-up cases against good, honest farmers who have tried their best to be law abiding citizens and who I have found care about their workers. The grantees litigate claims involving no out-of-pocket losses, demanding tens of thousands of dollars for technical violations. Abuses I have witnessed occur during all phases of litigation: the open solicitation of clients, misuse of "settlement" negotiation process and the pursuit of litigation strategies that reflect the social agenda of the lawyers and their seemingly unlimited resources to wage war on growers.

Solicitation

The first major area of abuse is solicitation. Certain LSC grantees have a penchant for taking advantage of the uneducated workers who are cajoled into signing blank "intake" forms which are used to initiate a lawsuit. I have deposed workers who, when told what their lawsuit is about, were incredulous, denying they would have been party to such a suit. We have deposed workers who admittedly signed consent to sue forms to bring wage claims against the grower before they received their first paycheck. To the grantee, plaintiffs are a legal technicality: they need a name to place on the caption of a lawsuit. The real "plaintiffs" are the grantees themselves who use litigation to advance their own social agenda.

Grantees have also abused the workers by misrepresenting who they are and their purposes. In one case, grantee employees passed themselves off as immigration officials to gain worker confidence. Once admittance was gained to the workers private bedrooms, the grantee then obtained signed intake forms and a lawsuit was born. We believe that workers are also enticed into lawsuits with promises of winnings which range from $2,000 to $5,000. This is a great deal of money for workers who merely have to show up at a deposition and complain about the farm or the camp. I am concerned that LSC grantees are creating a class of plaintiffs. I am aware that some farmworkers choose to work on a certain farm in order to collect a "bonus" at the end of the harvest. The "bonus" they anticipate is a settlement check they expect the grantee to obtain for them. The abuse is similar to the type of scam plaguing the automobile insurance industry. The only difference is that farmers have no insurance company deep pockets to settle these claims.

We have seen solicitation abuse where the grantee misrepresents the nature and extent of its "investigation", informing workers that the grantee has proof of serious violations, which proof does not exist. For example, the following is a solicitation letter from a grantee to a worker:

> After speaking with all of the workers and after examining the receipts, we have determined that you had many problems in the...Camp. This includes the fact that you did not receive minimum wages due to the unreasonable charges for food and other things. Exhibit 1.

The solicitation is improper because it is a lie: the grantee had not communicated with every worker, as alleged. A number of workers were never contacted. This creates a false impression that all other workers have agreed to a lawsuit. Secondly, the grantee has no proof of any meal violation: the only way to determine if a violation with respect to the purchase of food occurs is to determine whether the revenue generated by meals exceeds the cost of providing meals. The grantee has never seen either the revenue or the cost records. I know this to be the case because the farm labor contractor keeping the records has not turned copies of them over to the grantee. The grantee's solicitation letter is simply an enticement to workers to participate in a lawsuit it has no idea if it can win.

In addition, once farmworkers have become plaintiffs in an LSC driven lawsuit, it is virtually impossible for them to withdraw from the suit. LSC attorneys, eager to convey the image of mass discontent use every means at their disposal to keep their plaintiffs in "the fold." In one instance, after a plaintiff expressed a desire to withdraw from a lawsuit because he did not have any complaints against the grower, an LSC attorney, paralegal and translator proceeded to verbally browbeat the poor worker for several hours until at the verge of tears, they led him away from the building. Amazingly enough, the farmworker remained firm in his decision to withdraw from the suit. In the same case, another worker who did not want to be a plaintiff was approached by an LSC attorney who told him that the judge would be mad at him if he did not testify at his deposition. This was the same day that an LSC paralegal had barged in this person's room at 6:30 a.m., which he was occupying with his girlfriend at the farm labor camp, to attempt to convince the worker that he had a claim and should testify at his deposition. The two workers described above are stronger than most and were able to resist the coercive and strong-arm tactics of LSC grantees -- most workers are not as strong and easily fall in line with the LSC's army of false prophets.

Litigation

A second area of abuse is the prosecution of lawsuits which, in the private practice of law, would either have been rejected by the attorney as not being legitimate, or once taken, would have been settled for reasonable amounts. These cases involve highly technical "violations" and seek thousands of dollars in damages, even though the worker did not suffer any lost wages.

We have seen cases where a grantee seeks thousands of dollars of damages for workers who were employed as little as one day, even though these workers were paid every single penny owed to them. The "claims" brought on behalf of these workers are technical: a notice was not posted; a toilet was stopped up; a crew leader sold a beer or cigarettes. To grantees, an unposted notice is worth $500 per person, even if the growers posted it and the workers took it down; the toilet stoppage is worth $500 per worker, even if it is discovered that the workers used newspaper instead of toilet paper and, when called, the plumber discovers shoes and all manners of things clogging the pipes, placed there by workers. The cigarette and beer is worth $500 per worker because the grower or the crew leader was not licensed to vend such products, even though the worker wanted it and the price was fair. Items which may be of great benefit to workers, such as soda machines, juke boxes and pool tables, are the subject of lawsuits, at $500 per person. The point is, grantees could care less if you are a conscientious employer who has complied with the law. As metaphorically stated above, they have nothing else to do but conjure up new theories in an attempt to redress imaginary grievances. For example, the following allegations are litigated:

1. The grower failed to disclose at the time of recruitment that a soda machine was in the camp.

2. The grower failed to disclose at the time of recruitment that a juke box was in the camp;

3. The grower failed to disclose at the time of recruitment that a pool table was in the camp.

In these cases, the crew leader obtained these items and took a percentage from the vendor, as is customary in business in this country. There have been no allegations that the price of the soda, the music or a game of billiards was excessive.

LSC grantees view these alleged transgressions as heinous: they demand $500 per worker, going back three years. If you had 100 workers (even if they only worked one day each), the bill submitted by LSC grantees is $500 x 100 workers, or $50,000.

Grantees have also sued on these facts: workers quit their employment and demanded their pay checks from a grower in Pennsylvania. While the paychecks were being prepared, the workers took off, refusing to wait the short time necessary to have the checks delivered to them. The farmer then called a government agent to get help in locating these workers, to no avail. On the 30th day, with the farmer ready to mail the checks to the last known addresses, the grower received a demand letter from an LSC grantee. Immediately, the grower gave the checks to his attorney, who turned them over to the grantee. The grantee then sued, claiming an amount equal to the wages paid! The grantee's theory was that the check had to be sent by the 30th day to avoid the penalty. The grantee ignored the efforts made to locate the workers; that the checks were in the mail on the 30th day, and the fact that the grantee's premature demand letter is what caused those checks to be held up for just a couple more days. This is the type of claims some LSC grantees are reduced to litigating.

The grantees know that it is cheaper for the grower to pay than to litigate. Occasionally, they encounter a grower-defendant who is willing to fight. A classic case, recently concluded, is Sharpe v. Roth, wherein a grantee waged all out war on a small grower in Pennsylvania claiming tens of thousands of dollars in damages and spending hundreds of thousands of dollars to litigate the case only to recover less than five thousand dollars on behalf of the plaintiffs. In defending the case the grower's attorney, Richard Farina of Reed, Smith, Shaw & McClay determined the grantee had induced plaintiffs to sign blank forms and verifications they knew nothing about, coached witnesses during depositions and engaged in time consuming and frivolous discovery, including walking around the growers apple orchard taking pictures of trees. (Exhibit 2, pp. 5-8).

Judge Sylvia Rambo, hearing the case in the District Court of the Middle District of Pennsylvania, learned first hand during the course of the case about the tactics of the grantee and sharply criticized them for their over prosecution of the case. (Exhibit 3) She awarded the grantee only a small fraction of their fees and costs sought in the case, stating that the "hours spent on certain tasks were inordinate" and that the fee petition submitted indicated that "counsel threw cost effective management of litigation out the window." (Exhibit 4, pp. 3-4) Judge Rambo also attacked the LSC's attorneys handling of settlement negotiations stating that they had "effectively scuttled" chances for settlement when the opportunity was present. (Exhibit 4, p. 7).

Settlement

A major area of abuse is settlement. Historically, grantees have settled a lot of cases for large dollar amounts that were

grossly disproportionate to potential damage awards. Why? Because they intimidate and take advantage of growers. Grantees create the appearance of wanting to settle claims; their demand letters even reference a willingness to settle. However; this is often a ploy. What really happens is this:

1. The demand letter is sent. Typically it is long, cites numerous statutory violations, and closes with an invitation to discuss settlement. Often, no workers are identified; no specifics are given. An example of such a letter is attached as Exhibit 5. Note that no workers are identified and no specifics of any alleged violations are given in that letter.

2. The grantee then informs the grower that settlement is possible only if the grower opens all of his books and records to the grantee.

3. The grantee reviews all documentation and announces that the price of settlement is increased because of the numerous new violations disclosed by the records. The grower realizes he has been had, that the grantee used settlement for the sole purpose of enhancing his case against the grower.

4. The settlement demand is then made. Frequently, it exceeds the total wages paid to the worker; in many cases it exceeds the entire payroll. This is true even if the workers suffered no out-of-pocket losses and the claims involve only technicalities.

5. The grantee-attorney warns the grower that it costs more to litigate against him than to settle. The grower, not aware of any economical alternative, then settles.

As Judge Rambo chastised, Friends of Farmworkers "scuttled" negotiations by attaching wholly unwarranted conditions to settlement. (Exhibit 4, p. 17).

Conclusion

Based on my observation and experience in representing farmers in litigation against LSC grantees as detailed above, I firmly believe the abuses of LSC grantees must be curbed. Accordingly, I fully support the efforts made in the McCollum-Stenholm Amendment last year to address those very serious problems which to continue to plague the agricultural community.

January 30, 1990

Mr.

Dear Companion:

We, Legal Services, are starting a complaint against Contractor and where you worked picking apples in Pennsylvania during the 1989 harvest .

After speaking with all of the workers and after examining the receipts, we have determined that you had many problems in the Camp. This includes the fact the you did not receive minimum wages due to the unreasonable charges for food and other things.

Please communicate with us as soon as possible in order for us to speak and form the part of the complaint so that you can recover your lost wages. Please call for free the telephone number: and speak with the lawyer or with

Hopefully you will communicate with us soon.

Attentively,

Paralegal

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

ELIZABETH SHARPE, CYNTHIA SHARPE, LENROY SHARPE, ALBERT SHARPE, DAVID BECKFORD, LEROY BLAKE, ALLEN CAMPBELL and MABLE WRIGHT, Plaintiffs, v. PHILIP A. ROTH, APPLE VALLEY FARMS, INC. and P.A.R. ORCHARDS, Defendants.	CIVIL ACTION INDEX No. 88-0814 (JUDGE RAMBO)
PHILIP A. ROTH, Counter-Plaintiff, v. ELIZABETH SHARPE, CYNTHIA SHARPE, LENROY SHARPE, ALBERT SHARPE, DAVID BECKFORD, LEROY BLAKE, ALLEN CAMPBELL and MABLE WRIGHT, and FRIENDS OF FARMWORKERS, INC., Counter-Defendants.	

DECLARATION OF RICHARD H. FARINA

RICHARD H. FARINA declares and says:

1. I am a member of the law firm of Reed Smith Shaw & McClay and am co-counsel for defendants in this action.

EXHIBIT 2

2. This declaration is submitted in support of Defendant Roth's Motion (1) for Leave to File Supplemental Answer and Counterclaim, (2) to add Friends of Farmworkers, Inc. as Counter-defendant, and (3) to Withdraw this Action from the March Trial Calendar to Allow Appropriate Additional Discovery. This declaration is also submitted in opposition to Plaintiffs' Motion for Sanctions under F.R.C.P. Rule 11.

3. I have read the declaration of John Mark Finnegan in support of plaintiffs' aforesaid motion and in opposition to defendant Roth's aforesaid motion. With respect to the operative allegations in defendant Roth's proposed Supplemental Answer and Counterclaim (paragraphs 33-61), I have noted that Mr. Finnegan's declaration generally does not deny or contradict those allegations, does not say they are not *true*, but rather argues that they are not "new." By way of specific example, I have noted that:

(a) Mr. Finnegan's declaration, at paragraphs 55-68, does not contradict the allegations of paragraph 51 of Mr. Roth's proposed Counterclaim relating to manipulation of the plaintiffs by Friends of Farmworkers, Inc. in respect of having plaintiffs sign incomplete documents, blank forms, undated signature pages, and the like, and in respect of having plaintiffs purport to sign or verify papers they have not read, that have not been read to them,

that they have not seen, or that they do not understand. On the contrary, Mr. Finnegan's declaration simply argues that the allegations of paragraph 51 of Mr. Roth's proposed Counterclaim are not "new."

(b) Similarly, Mr. Finnegan's declaration, at paragraphs 74-77, does not dispute, deny, or contradict the allegations of paragraph 47 of Mr. Roth's proposed Counterclaim to the effect that Friends of Farmworkers, Inc. used its former clients in the *David Lee* matter to solicit the plaintiffs herein to make claims against Mr. Roth. On the contrary, Mr. Finnegan's declaration merely argues that defendants should have figured that out sooner.

(c) Most significantly, Mr. Finnegan's declaration, at paragraphs 81-87, does not dispute, deny, or contradict the central allegations of Mr. Roth's proposed Counterclaim to the effect that this lawsuit has been brought and maintained by Friends of Farmworkers, Inc. in retaliation for Mr. Roth's Congressional testimony and other activities. On the contrary, Mr. Finnegan's declaration merely restates his theme that those allegations are not "new" and that defendants should have sooner taken action with respect to them.

Because Mr. Finnegan's declaration characterizes such grave allegations as old business upon which defendants allegedly should have acted sooner, I make this declaration, the principal portion of which relates to the basis on which I and my partner, James K. Kearney, concluded that Mr. Roth's aforesaid motion should be filed.

4. Shortly after commencement of this action by Friends of Farmworkers, Inc., I began to suspect that this action had been initiated and was being employed for improper purposes of punishment, retaliation, and intimidation as alleged in Mr. Roth's proposed Counterclaim. At that point my suspicions were based on my correspondence with Mr. Finnegan as contained in Exhibit A hereto and my knowledge, obtained from Mr. Roth and review of documents in his files, of the matters set forth in paragraphs 34-46 and 48-49 of Mr. Roth's proposed Counterclaim. I personally investigated the facts stated in those paragraphs and read the documents related thereto. I have noted that nothing in Mr. Finnegan's declaration purports to deny or contradict any of those facts.

5. I became increasingly suspicious of the motives and purposes of Friends of Farmworkers, Inc. during the course of discovery in this case. The bases for my increased suspicions were as follows:

(a) Friends of Farmworkers, Inc. sought wide-ranging, burdensome, and irrelevant discovery, including Mr. Roth's records relating to his employees not among the plaintiffs herein and employment records for years not implicated by this action; subjected Mr. Roth to two full days of deposition (being more time than was used by defendants in the combined depositions of all eight plaintiffs); made a request for entry and inspection of Mr. Roth's farm that was improper with respect to the applicable time periods prescribed by the Federal Rules of Civil Procedure, was permitted to enter despite the impropriety of the request, and proceeded to occupy a day of defense counsel's time for the purpose of walking about and taking irrelevant photographs of trees (copies of which photographs were requested by defendants but never provided); and, three working days in advance of plaintiffs' depositions scheduled by defendants, noticed depositions by plaintiffs of themselves for the same time and place, requiring defendants to obtain an order of the Court to prevent plaintiffs from shifting their own expenses onto defendants and to permit defendants to take discovery without interference by plaintiffs.

(b) During the course of discovery I learned that prior to the initiation of this action plaintiffs had had conversations with claimants represented by Friends of Farmworkers, Inc. in the *David Lee* matter referred to in paragraphs 46-48 of Mr. Roth's proposed Counterclaim. I did not know that earlier.

(c) During the course of discovery I became aware of the manner in which the plaintiffs herein had been manipulated by Friends of Farmworkers, Inc. as set out in paragraph 51 of Mr. Roth's proposed Counterclaim. In discovery, I received numerous papers purportedly verified or signed by plaintiffs, including (i) papers that post-date the date of the attached or accompanying verification pages and (ii) ribbon originals of papers to which are attached folded, wrinkled, and soiled verification pages produced by photocopier and dated in a hand not that of the signatory. I believe that the deposition transcripts of the plaintiffs speak for themselves in showing that plaintiffs signed, verified, or purported to sign or verify papers they had not read, that had not been read to them, that they had not

seen, or that they did not understand. In that connection I refer to the excerpts from plaintiffs' deposition transcripts accompanying this declaration.

(d) During the course of discovery I observed many instances in which it appeared to me that the plaintiffs' deposition testimony and written statements had been coached or written by Friends of Farmworkers, Inc. to agree with legal theories advocated by Friends of Farmworkers, Inc. On October 11, 1988, following deposition of plaintiffs on that day, Mr. Finnegan stated to me and to Mr. Kearney that he was aware that he had a reputation for coaching his witnesses.

(e) During the course of discovery the essentially frivolous nature of the claims being advanced by Friends of Farmworkers, Inc. became progressively more apparent to me, reinforcing my suspicions that Friends of Farmworkers, Inc. indeed had its own hidden agenda in spending large amounts of time and energy in the prosecution of Mr. Roth for purposes other than adjudication of plaintiffs' claims.

Particular Recent Events Leading to Mr. Roth's Motion

6. On September 29, 1988, I received a telephone call from a woman who identified herself as Dottie Strunk. Ms. Strunk did not give her title, but stated that Congressman William F. Goodling, a member of the United States House of Representatives, had asked her to call me for information relating to this case. Neither Mr. Roth nor I brought this litigation to the attention of Ms. Strunk, Congressman Goodling, or any other government official.

7. Ms. Strunk indicated to me that Mr. Goodling had heard of this case and was deeply concerned that it had been brought and maintained against Mr. Roth by Friends of Farmworkers, Inc. in retaliation for Mr. Roth's testimony before a Congressional subcommittee on July 13, 1987, and for other improper purposes related to personal animosity against Mr. Roth on the part of Friends of Farmworkers, Inc. arising from Mr. Roth's labor-management reform activities.

8. On October 3, 1988, I wrote to Ms. Strunk giving her the information and documents she requested in our telephone conversation of September 29, 1988. Exhibit A hereto is a true copy of my letter and its enclosures.

9. I believe that Exhibit A hereto is an important document with respect to the motions now pending before the Court. I have noted that it is discussed, quoted, and

complained of by plaintiffs in their submissions respecting their pending motion for sanctions, but it has not been furnished to the Court by plaintiffs' counsel even though plaintiffs' counsel has a copy. (Exhibit A also comprises sworn statements of fact by Mr. Roth that support the allegations labelled "Background" in Mr. Roth's proposed Counterclaim. In signing Mr. Roth's proposed Counterclaim, I relied, in part, on those sworn statements as well as on my investigation of the facts set forth therein.)

10. At the time of my letter to Ms. Strunk, no depositions had yet been taken of the plaintiffs (for the reason stated in paragraph 24 hereof). I considered that allegations of improper targeting of Mr. Roth by Friends of Farmworkers, Inc. were extraordinarily serious and not to be made without a sound basis, certainly not before discovery could show whether Friends of Farmworkers, Inc. might have a body of credible evidence that could make me doubt what I had learned from Mr. Roth and from examination of his records. Because of the posture of the case at the time, therefore, I avoided making any such accusations in my letter.

11. On November 2, 1988, Ms. Strunk asked me by telephone whether I had any objection to her sharing my aforesaid letter of October 3, 1988, with a member of the United States House of Representatives Committee on the Judiciary and certain members of the staff of that committee.

I replied that my aforesaid letter was hers to do with as she pleased and that a copy had already been furnished to the plaintiffs in discovery. Ms. Strunk did not identify any member or staff member of the Committee on the Judiciary who had asked her for a copy of my letter.

12. In December, 1988, I learned from one of Mr. Roth's former employees (not among the plaintiffs herein) that Friends of Farmworkers, Inc. had solicited that person to join this lawsuit as a plaintiff even though that person had expressed no grievance concerning his employment with Mr. Roth.

13. On January 9, 1989, I received a telephone call from a man who identified himself as James Schoener of Legal Services Corporation. Mr. Schoener informed me that his position at Legal Services Corporation involved monitoring the activities of Legal Services Corporation's grantees, including Friends of Farmworkers, Inc. Mr. Schoener told me that this case had been brought to his attention, but he did not say by whom. I had had no prior contact with Legal Services Corporation concerning this lawsuit and Mr. Roth has told me that he has had none.

14. In the aforesaid telephone call Mr. Schoener said that in light of his review of this case and its background, and in light of his familiarity and experience with the funding, objectives, and strategies of certain

grantee organizations, he had serious concerns that Friends of Farmworkers, Inc. had targeted Mr. Roth and had instituted and was maintaining this action as retaliation and punishment for Mr. Roth's Congressional testimony and other activities.

15. In mid-January, 1989, I learned that Mr. Roth had received a telephone call on January 12, 1989, from William Daniels. I also learned that in that telephone call Mr. Daniels told Mr. Roth that Arthur N. Read, co-counsel for plaintiffs herein, had recently initiated a telephone call to Mr. Daniels and had asked Mr. Daniels to speak to Mr. Roth and try to persuade Mr. Roth to agree to the latest settlement. demands made by Friends of Farmworkers, Inc. in this case, which included payments to Friends of Farmworkers, Inc. I was aware that Mr. Read, at the time he called Mr. Daniels, had read my letter to Ms. Strunk, which letter had been previously produced to plaintiffs by defendants in discovery. I believe that Mr. Read's conduct in using Mr. Daniels to communicate with and place pressure on Mr. Roth, without the knowledge or consent of Mr. Roth's counsel in this case, constituted a patent violation of Rule 4.2 of the Rules of Professional Conduct. I do not believe that there is or was any basis on which Mr. Read could have thought that Mr. Daniels represented Mr. Roth in this case or any other. Mr. Roth has informed me that Mr. Daniels has never served as Mr. Roth's counsel in any matter at any time.

16. Late in January, 1989, I received a telephone call from a farmer in Pennsylvania against whom Mr. Finnegan had asserted numerous claims on behalf of various farm workers, including workers whom Mr. Finnegan had refused to identify. The farmer called me to ask whether my firm would consider representing the farm in connection with Mr. Finnegan's pending claims against the farm. The farmer told me that Mr. Finnegan had recently met with the farmer's lawyer concerning those claims and had also met with the farmer in an effort to obtain the farm's employment records and to pressure the farmer to pay Mr. Finnegan's demands immediately. According to the farmer, Mr. Finnegan explicitly spoke of this case against Mr. Roth, saying that the farmer should immediately pay Mr. Finnegan's demands or else face enormous litigation expenses such as Friends of Farmworkers, Inc. had inflicted and would continue to inflict on Mr. Roth in this case. According to the farmer, Mr. Finnegan gave an estimate of the amounts Mr. Roth has had to spend in his defense of this case and Mr. Finnegan said that the farmer should expect similar treatment if the farmer chose to resist Mr. Finnegan's demands.

17. The foregoing recent events, coupled with my observations and knowledge gained during discovery in this case, convinced me that the primary purposes and motives of Friends of Farmworkers, Inc. in sponsoring and maintaining

this lawsuit against Mr. Roth were very likely as I had suspected them to be at the time I wrote to Ms. Strunk on October 3, 1988. I considered that the information described in the preceding paragraph constituted a clear and direct indication of the improper motives, purposes, and institutional agenda of Friends of Farmworkers, Inc. underlying this lawsuit and that such information corroborated my judgment that there were now good grounds for believing that Mr. Roth had in fact been improperly targeted by Friends of Farmworkers, Inc. for its own purposes unrelated to adjudication of plaintiffs' claims. Accordingly, and within a few days after I received the telephone call described in the preceding paragraph, Mr. Roth's motion was filed.

Conduct of Discovery Generally

18. Based on my experiences in dealing with Mr. Finnegan in respect of the plaintiffs' claims prior to the filing of the complaint herein, I concluded that it was necessary to deal with Mr. Finnegan only in writing, to the extent possible. In addition, I had been warned by prominent and respected lawyers who had had prior dealings with Mr. Finnegan that, based on their own experiences with Mr. Finnegan, it was necessary to communicate with Mr. Finnegan only in writing. Accordingly, virtually all matters relating

to the conduct of discovery in this case are reflected in correspondence between counsel for defendants and counsel for plaintiffs, in written discovery served by counsel, or on the record in deposition proceedings. I believe those documents speak for themselves as to the conduct of discovery by defendants. Exhibit B hereto sets out true copies of the correspondence between defendants' counsel and plaintiffs' counsel relating to the conduct of discovery in this case. I do not believe that the documents in Exhibit B are particularly interesting or relevant to the issues currently before this Court, but since Mr. Finnegan's declaration sets out selected extracts from the correspondence and includes so many allegations about the conduct of discovery, I have chosen to present the entire record.

19. I have not invited, I do not welcome, and I am most reluctant to encumber this declaration by responding to every allegation made against me and Mr. Kearney in Mr. Finnegan's declaration with respect to the conduct of discovery in this case. I believe the most pertinent such allegations are adequately covered by other portions of this declaration and by Mr. Kearney's declaration herein. Nevertheless, Mr. Kearney and I cannot allow to pass uncorrected at least some of the other statements and representations in Mr. Finnegan's declaration that we consider to be, variously, false or misleading or both. Mr. Kearney

and I have accordingly prepared Exhibit C hereto, which contains a non-exhaustive list of such statements taken from Mr. Finnegan's declaration together with our brief responses thereto. I regret the necessity of having to do that.

20. As to the affidavit and deposition of Joslyn Brown, to which Mr. Finnegan refers in his declaration, Exhibit D hereto is a true copy of that affidavit together with a true copy of a file memorandum prepared by me prior to the filing of plaintiffs' pending motion for sanctions, accurately stating the circumstances under which I obtained Mr. Brown's affidavit. I believe that memorandum fully addresses the insinuations of impropriety directed at me in Mr. Finnegan's declaration. Exhibit D accurately shows that I certainly did not pressure Mr. Brown in any way, ply him with alcohol or offers to take him drinking, or fail to explain that if he gave me a statement it would be used in this case and that he could be called as a witness. Mr. Brown did make it clear to me that he was not interested in suing Mr. Roth, joining the plaintiffs in this case, or being sued by anyone. I assured him that if he chose to give an affidavit it would not mean that he would be joining the plaintiffs in this action and it would not mean that he was being sued by them or by Mr. Roth. At his deposition, Mr. Brown, who had by then been subpoenaed by Mr. Finnegan and who had met with Mr. Finnegan the previous afternoon, appeared to be confused as to

what I had told him in that respect. It was clear to me that he was not confused about the matter when he and I had met in December. Further, and contrary to the assertion in Mr. Finnegan's declaration, I believe that Mr. Brown, at his deposition, affirmed the accuracy of virtually every statement in his affidavit, with no more than two inconsequential exceptions (which exceptions are treated in Exhibit D hereto). I believe Mr. Brown's deposition transcript speaks for itself on that matter. A copy of that transcript accompanies this declaration.

21. The affidavit of Joslyn Brown was obtained by me on December 30, 1988, and was mailed to counsel for the plaintiffs on January 10, 1989. During the interim period I returned the affidavit by mail to the notary for her correction of the name of the county in which the affidavit was given. Exhibit E hereto is a true copy of my letter to the notary so transmitting Mr. Brown's affidavit. Contrary to the insinuation in Mr. Finnegan's declaration, I did not withhold Mr. Brown's affidavit from plaintiffs' counsel or delay in sending it to them, but served it upon them immediately after it was returned to me by the notary.

22. Mr. Finnegan's declaration complains that I contacted Mr. Brown and sought his testimony later than I should have. I did those things, however, only because plaintiff David Beckford, in his October, 1988, deposition

testimony, claimed for the first time that he had been responsible for bringing Mr. Brown into Mr. Roth's employ. When Mr. Roth later told me that he did not believe that was true, I decided to ask Mr. Brown, who confirmed that David Beckford had had nothing to do with Mr. Brown's seeking of employment on Mr. Roth's farm. Until the issue was raised by plaintiff David Beckford's testimony, I had no reason to contact Mr. Brown.

23. Mr. Finnegan's declaration contains numerous complaints (the relevance of which I do not understand) relating to the expense borne by defendants and their counsel in respect of discovery proceedings, including that defendants' counsel have used express mail and hand delivery to provide documents to plaintiffs' counsel, that defendants' counsel traveled to Florida to take depositions of two plaintiffs who were unable or unwilling to be deposed in Harrisburg, and that defendants' counsel traveled to depositions by plane rather than by car. Since Mr. Roth is the sole proprietor and operator of his farm and a man of very modest means, I can appreciate Mr. Finnegan's concern even though I do not understand its relevance to any issue before this Court. In respect of the aforesaid expense matters I state as follows and refer to the documents in Exhibit B hereto:

(a) I have employed express mail and hand delivery methods of communication where necessary and appropriate to provide prompt delivery to plaintiffs' counsel, often at the request of plaintiffs' counsel.

(b) Defendants originally scheduled the depositions of two plaintiffs at the offices of defendants' counsel in Delray Beach, Florida, because I was advised by Mr. Finnegan that those two plaintiffs were in Florida and would not appear elsewhere. After I learned that one of those two plaintiffs was confined to Polk County by the terms of his prison release, defendants withdrew their notice of deposition and later rescheduled the depositions of both Florida plaintiffs for Lakeland, Florida, which is in Polk County. (Contrary to paragraph 52 of Mr. Finnegan's declaration that "Defendants' counsel rejected every attempt to conduct deposition by phone as directed in the Court's Order dated July 26, 1988," the only request by Mr. Finnegan for telephone depositions related to the two plaintiffs in Florida, as to which I invited Mr. Finnegan, in writing, to participate by telephone if he preferred not to travel to Florida. Mr. Finnegan chose instead to take those depositions himself and to do so in person.) Mr. Kearney had

other business in Florida at the time and did not make a special trip to Florida for the purposes of attending the depositions, which I did not attend. I did not charge Mr. Kearney's air fare to Mr. Roth. Except for the two depositions taken in Florida by Mr. Finnegan for plaintiffs' convenience, all depositions of plaintiffs were taken (some by plaintiffs and some by defendants) in Harrisburg, where Mr. Finnegan and Mr. Read took the deposition of Mr. Roth. Moreover, the depositions taken of plaintiffs in Florida were, in fact, not taken by defendants at all. Such depositions were taken by Mr. Finnegan in person, at his election, pursuant to a notice of deposition served by him specifying the date and place therefor, being the same date and place proposed by defendants. Exhibit F hereto is a true copy of that notice of deposition as served on me by Mr. Finnegan.

(c) When Mr. Kearney and I traveled to other depositions by air, we did so in my personal aircraft, for which I make no charge to anyone.

24. Mr. Finnegan's declaration (paragraphs 48-49) complains of the fact that defendants did not initiate immediate discovery from plaintiffs. Defendants completed their discovery of plaintiffs within the time prescribed by

order of the Court. Mr. Kearney and I did not schedule early depositions of the plaintiffs because Mr. Finnegan advised the Court, Mr. Kearney, and me on July 26, 1988, that plaintiffs could be expected to be in Pennsylvania in late September and in October, 1988, for the harvest season. Mr. Kearney and I accordingly scheduled plaintiffs' depositions for that period, as an accommodation to plaintiffs. We similarly served defendants' interrogatories for response during that period, rather than earlier when Mr. Finnegan's clients impliedly would not have been available to him.

Disclosure of the Name of David Lee

25. Neither I nor anyone in my firm was counsel for Mr. Roth in the *David Lee* matter.

26. Mr. Finnegan's declaration asserts that Mr. Roth, my firm, and I have "wantonly" breached a confidentiality agreement allegedly contained in the releases provided to Mr. Roth in the *David Lee* matter. Before I first disclosed the name of David Lee to anyone (that being in my October 3, 1988, letter to Ms. Strunk), I reviewed Mr. Roth's files with respect to the *David Lee* matter. From those files I determined as follows: (a) the *David Lee* matter involved litigation threatened against Mr. Roth by Mr. Finnegan in June, 1985, on the basis of various claims, some specified by

Mr. Finnegan and some not; (b) Mr. Roth, through his counsel, offered to settle the matter in return for general releases from the claimants (which requirement for general releases was contained in every letter from Mr. Roth's counsel to Mr. Finnegan respecting settlement); (c) no response was received from Mr. Finnegan for more than two years; (d) promptly after Mr. Roth's Congressional testimony in 1987, Mr. Finnegan resurrected his settlement demand in the *David Lee* matter, in response to which Mr. Roth, through counsel, offered to meet that demand in return for general releases from the claimants; (e) Mr. Finnegan supplied limited-scope releases not acceptable to Mr. Roth; (f) Mr. Roth's counsel told Mr. Finnegan that the releases provided by Mr. Finnegan were not sufficient and sent Mr. Finnegan settlement checks to be distributed only if the claimants provided general releases in a form supplied by Mr. Roth's counsel; (g) Mr. Finnegan returned the settlement checks and demanded an increased amount to settle the matter on the basis of general releases; and (h) Mr. Roth, through counsel, agreed to pay the increased amount in return for general releases.

27. From my review of Mr. Roth's files in the *David Lee* matter I further determined that Mr. Roth's counsel prepared a form of general release to be executed by the claimants in the matter, showed that form to Mr. Roth, obtained Mr. Roth's approval thereof, and provided that form

to Mr. Finnegan. Exhibit G hereto contains a true copy of that form as approved by Mr. Roth and taken by me from his files.

28. From my review of Mr. Roth's files in the *David Lee* matter I further saw that (a) the releases ultimately provided to Mr. Roth by Mr. Finnegan were provided to Mr. Roth after the increased settlement money had been paid and were not in the form approved by Mr. Roth and drafted by his counsel, but instead contained the confidentiality provision now being referred to by Mr. Finnegan in his declaration; (b) the confidentiality provision itself did not reference or purport to embody any agreement by Mr. Roth but was rather in the form of a purported "warranty" by Mr. Roth; (c) the releases containing the purported "warranty" by Mr. Roth were not signed by Mr. Roth or by anyone on his behalf and did not contain any signature line or other indication suggesting that any such signature was contemplated; (d) there was no reference in the file to any settlement agreement or other contract imposing any confidentiality obligation on Mr. Roth; and (e) to the extent that the releases concerned the aforesaid purported "warranty" they merely recited what would have been the case in any event, namely, that the releases did not operate to preclude any claims of retaliation or blacklisting arising from future actions. I also considered that any such purported "warranty" by Mr. Roth in a release

executed only by a claimant and delivered solely to Mr. Roth, could have no legal effect, whether or not Mr. Roth or his former counsel had consented to the inclusion in the releases of the purported "warranty."

29. Based on the foregoing I considered that there was no confidentiality contract binding upon Mr. Roth and, even if there were, that no party to this action could possibly have any rights thereunder or any standing to complain of any alleged breach thereof. It was on that basis, and the basis set out in paragraph 31 below, that I first used the name of David Lee in order to identify the *David Lee* matter in my letter to Ms. Strunk.

30. I have since spoken to Mr. Roth's former counsel in the *David Lee* matter. He has told me that Mr. Finnegan insisted on adding the purported "warranty" to the aforesaid form of release prepared by Mr. Roth's counsel; that he acceded to Mr. Finnegan's insistence; and that the purported "warranty" was drafted by Mr. Finnegan and appears in the executed releases as so drafted by Mr. Finnegan. He has also told me that it was at all times his understanding that the purported "warranty," if it had any legal significance at all, was contemplated to be only for the benefit of the respective claimants in the *David Lee* matter.

31. Before I first disclosed to anyone the name of any claimant in the *David Lee* matter, plaintiffs and Friends of Farmworkers, Inc., on September 27, 1988, themselves disclosed the name of one such claimant in plaintiffs' interrogatory responses in this case. I considered that to be a clear indication that neither plaintiffs nor Friends of Farmworkers, Inc. believed the purported "warranty" to have such scope as to inhibit identification of the *David Lee* claimants for purposes of this lawsuit, in which there is no question involving blacklisting of any such claimant.

32. My letter to Ms. Strunk, which disclosed the name of David Lee, was produced to plaintiffs on October 31, 1988. Prior to the filing of plaintiffs' pending motion for sanctions, the only mention of the confidentiality provision by plaintiffs or their counsel occurred in a telephone call I made to Mr. Read on the evening before plaintiffs filed their motion for sanctions. In that telephone call, Mr. Read informed me that he intended to file plaintiffs' motion for sanctions based, in part, on my disclosure of David Lee's name.

Settlement Matter

33. In this declaration I do not propose to comment on settlement discussions and settlement correspondence relating to this case except as noted in Exhibit C and except as is necessary here to refute the statements made by Mr. Finnegan in paragraph 72 of his declaration.

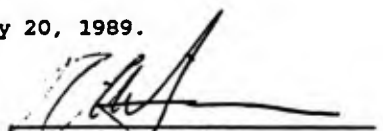
34. Contrary to Mr. Finnegan's declaration, substantive settlement discussions did take place in a meeting on October 11, 1988, among Mr. Finnegan, Mr. Kearney, and me. Exhibit H hereto is a true copy of a file memorandum prepared by me with respect to that meeting, except that the copy has been redacted to omit dollar amounts and to omit references to a different settlement meeting. Exhibit H accurately reflects that in the settlement discussions of October 11, 1988, Mr. Finnegan took the position that he would not recommend any settlement to the plaintiffs unless such settlement included payments to Friends of Farmworkers, Inc. I believe the impropriety of that position is conceded by plaintiffs in footnote 6 of Plaintiffs' Memorandum of Law submitted in support of plaintiffs' pending motion for sanctions. Mr. Finnegan had consistently maintained that position from the time this lawsuit had been filed.

* * * * * * * * * * * *

35. By this declaration I do not waive the application of the attorney work product doctrine as to any document or portion of a document not contained in the Exhibits hereto. I have discussed this declaration with Mr. Roth, who has authorized me to state that he does not waive the attorney-client privilege with respect to any communication or portion thereof except to the extent, and only to the extent, that such communication or portion thereof is recited herein.

I declare under penalty of perjury that the foregoing statements by me are true and correct to the best of my knowledge, information, and belief.

Executed on February 20, 1989.



Richard H. Farina

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ELAINE CHANDLER and WALTER SOLOMON, individually and on behalf of all other persons similarly situated,	:	CIVIL ACTION NO. 84-1573
Plaintiffs	:	
v.	:	
APPLE VALLEY FARMS, INC.; PHILIP A. ROTH; and JOE LEE CREWS,	:	
Defendants	:	

MEMORANDUM AND ORDER

On October 25, 1986, this court (by Herman, J.) issued a final order and judgment in the captioned action. That order was an injunctive order incorporating certain terms of a settlement agreement. The settlement agreement at paragraph 23 provides:

> The Apple Valley defendants shall utilize and shall fully and accurately complete a wage statement form similar to Form WH-501 of the United States Department of Labor, Wage and Hour Division (see Exhibit "C" attached) setting forth for each agricultural worker (including all such workers suffered or permitted to work) the following information: (1) worker's name; (2) worker's permanent address; (3) worker's social security number; (4) starting and stopping times, together with a statement of a [sic] total hours worked for each day; (5) units of work done; (6) rate of pay (where paying on piece work basis if minimum hourly pay rate of $3.35 per hour or other guaranteed hourly rate exceeds piece rate earnings must pay hourly rate instead of piece rate); (7) total gross pay; (8) itemization of each deduction and the

purpose therefore and total of deductions (if any); (9) net pay; and (10) the address of Apple Valley Farms. Such forms shall be completed for each pay week and one (1) copy thereof shall be provided to each worker upon payment of wages. Additional copies shall be retained by any farm labor contractor and the Apple Valley defendants. On one of these copies the agent dispensing pay must sign his name or initials and he shall have each worker sign his name confirming receipt of the wage statement form and of the days' wages. Such signed copies shall be retained for at least three (3) years by the Apple Valley defendants.

In 1988, the case of Sharpe v. Roth, Civil No. 88-0814, was commenced. By order dated November 21, 1989, this court awarded judgment in favor of six of the named plaintiffs in that action. That suit involved allegations against defendants Roth, Apple Valley Orchards and P.A.R. Orchards of violations of the Fair Labor Standards Act (FLSA), the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), and the Pennsylvania Seasonal Farm Labor Act (PSFLA). These violations primarily consisted of record keeping violations. The order of November 21, 1989 was amended by an order dated March 21, 1990 which increased the amount of the award. No injunctive relief was granted.

As a result of the judgment in Sharpe v. Roth, plaintiffs in that action filed a Motion to Enforce and Extend the Order For Injunctive Relief in this case. This motion is opposed by defendants.

The time has come to put these cases to rest. In Sharpe v. Roth, the memorandum dated March 21, 1990 set forth this court's view of the import of the Chandler case. See slip op. at 3. To

extend an injunction for three years for what this court deems diminimus violations would be extraordinary, harsh and inequitable. Any future record keeping violations by defendants can be addressed through the appropriate actions under the FLSA, AWPA, PSFLA and the Pennsylvania Wage Payment and Collection Law. Furthermore, plaintiffs in Sharpe v. Roth have not been employed by defendants for several years and their prospect for future employment is not likely considering the fact that Roth found them to be difficult employees with which to work.

This court makes no determination as to whether the Sharpe v. Roth plaintiffs have standing to request the injunction extension or whether claim and issue preclusion apply. This court has expended enough time and resources catering to plaintiffs over prosecution of this case.

Defendants' request for an award of attorney fees for the filing of the instant motion will be denied.

Accordingly, IT IS HEREBY ORDERED THAT:

1) the motion to enforce and extend order for injunctive relief is denied; and

2) defendants' motion for counsel fees is denied.

Sylvia H. Rambo
United States District Judge

Dated: April 26, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ELIZABETH SHARPE; CYNTHIA SHARPE; LEROY SHARPE; ALBERT SHARPE; DAVID RICHFORD; LEROY BLAKE; ALLEN CAMPBELL; and MABLE WRIGHT,	:	CIVIL ACTION NO. 88-0814
Plaintiffs	:	
v.	:	
PHILIP A. ROTH; APPLE VALLEY FARMS, INC.; and P.A.R. ORCHARDS,	:	
Defendants	:	

MEMORANDUM

Plaintiffs have filed for attorneys' fees and costs pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), the Pennsylvania Seasonal Farm Labor Act (SFLA), Pa. Stat. Ann. tit. 43, §§ 1301.101-1301.606 (Purdon Supp. 1989) and the Pennsylvania Wage Payment and Collection Law (WPCL), Pa. Stat. Ann. tit. 43, § 260.9a(f) (Purdon Supp. 1989). Plaintiffs were the prevailing parties in the captioned litigation.

In this case there were claims under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). The latter does not provide for the recovery of attorney's fees. Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1983). In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Court held, "Where the

plaintiff has failed to prevail on a claim that is distinct in all respects from his unsuccessful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." Id. at 440. The Court also stated, "The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." Id. at 437.

In the captioned case, there are no successful versus unsuccessful claims to analyze to determine the degree of success achieved; nor is this court presented with clearly related versus unrelated claims. In this regard the court acknowledges the claims under FLSA are different from those under AWPA. However, in the prosecution of the litigation--the discovery, the preparation for trial--the issues were treated as overlapping. Therefore, there has been no delineation of time devoted to FLSA versus AWPA claims. Whether this occurred because of mere inadvertence or otherwise, plaintiffs should not recover fees without some effort to segregate work on the various portions of the case. The damages awarded to plaintiffs on the FLSA issues amount to $1,024.02; the damages awarded under the AWPA amount to $2,050.00. Thus, fees are available on approximately thirty-three percent (33%) of the successful claims. After deducting certain hours which this court will not allow, a factor of 33% will be applied to the adjusted hours to reach the amount attributable to the FLSA claims.

Of further concern to the court is the fact that there was an excessive amount of time expended considering the size of the case and the issues involved. This case was not handled efficiently. The FLSA awards were personal to four individual plaintiffs.[1] The case was not a class action case. There were no unprecedented questions of law involved and no fundamental civil or constitutional rights were vindicated. Hours spent on certain tasks were inordinate. For instance, 57.3 hours are attributed to client interviews--all conducted after the depositions of most of the parties in the case had been taken. In addition, the time spent on preparing complaints, preparation for trial, and trial memoranda was also excessive. The law project representing plaintiffs specializes in farm labor law. Resources such as briefs, complaints, interrogatory forms, and the like should be available from previous litigation. The court agrees with defendants that the case was prepared and prosecuted unreasonably. The court notes with interest the case cited by defendants--Clark v. Atlanta Newspapers, Inc., 366 F. Supp. 886 (N.D. Ga. 1973). In Clark the court "emphatically agree[d] that plaintiff overtried his case. . . . The statutory award of costs and attorney fees . . .

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1. This court recognizes a negative multiplier cannot be applied simply because a civil rights question is by its nature singular to a plaintiff, Cunningham v. City of McKeesport, 753 F.2d 262, 269 (3d Cir. 1985). However, the instant case involves no civil rights issues.

cannot be taken by counsel as a blank check to prepare his case without reference to costs involved." Id. at 899.

This court emphasizes that it is not attempting to reach a fee award based on proportionality to the damages award. Indeed, the court recognizes that attorney fees need not be proportionate to damages received. See, e.g., Riverside v. Rivera, 477 U.S. 561 (1986). The fees awarded in this case are not based on proportionality. Rather, it is this court's opinion that counsel is responsible for tailoring the litigation with an eye towards the potential results. Plaintiffs knew the maximum award that could possibly be attained was $14,500. That result would be achieved only if all plaintiffs prevailed on all claims of statutory violations and were awarded the maximum statutory damages. By January 1989, plaintiffs' damage proposal for settlement was $5703.50. The fee petition submitted indicates that counsel threw cost effective management of litigation out the window.

In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the court considered awards in similar cases as a factor in determining a reasonable fee. Id. at 717-19. Exhibit A to defendants' brief in opposition to attorney fees sets forth a list of cases showing FLSA awards and attorney fees allowed. One case is a Third Circuit case in which the award was $23,813 and the fee allowed was $2,500.

Normally the concerns raised above might cause a court to adjust the lodestar downward. This cannot be done in this case.

As noted previously, the court is unable to determine what hours applied to FLSA issues and what hours applied to AWPA issues. Furthermore, the supporting documents to the fee petition are lacking. The are no contemporaneous time slips available to review. See Hensley, 461 U.S. at 437.

This court is faced with the fact that some successful plaintiffs are entitled to claims for attorney's fees and costs and other successful plaintiffs are not. But even attributing 33% of the hours to the FLSA claims does not solve the court's dilemma. The court has also considered the vagueness of the petition with respect to precise work performed; the simplicity of the issues involved; the minimal results achieved, and the fact that no civil rights or constitutional issues were involved. The foregoing, combined with counsels' expertise should have curtailed long hours of research and preparation. This court recognizes that applying a negative multiplier is not a course that should be taken frequently. However, the preferred method of reducing hours cannot be followed in this case for reasons previously stated. Fairness demands that the negative multiplier be applied in this case.

John Mark Pinnegan

The rate to be applied to attorney Pinnegan's time will be $90.00 per hour. This is consistent with the rate approved by Judge Weiner in Reyes-Garcia v. New Garden Farms, Inc., No. 88-1629 (E.D. Pa. 1989). Mr. Pinnegan seeks compensation for 280.7 hours.

The 5.4 hours for preparation of the pretrial memorandum and 11.2 hours for work on the counterclaim will be deleted as duplicative of time spent by Attorney Reed. The 3.5 hours for taking the video will be deleted as not related to the FLSA claim. Further, the 109 "discounted" hours will be deleted. There is no explanation given for these hours being discounted and the court notes that Mr. Reed did not include his "discounted" hours. Therefore, the following computation results for Mr. Finnegan:

Hours claimed	280.70		
Hours deleted	-129.10		
Subtotal	151.60		
33% FLSA factor	x .33		
Subtotal	50.03	x 90.00 per hour =	$ 4,502.70
Travel hours	125.50		
33% to FLSA	x .33		
Subtotal	41.42	x 35.00 per hour =	$ 1,449.70
Subtotal			$ 5,952.40
less 35% negative multiplier		5,952.40 x .35 =	- 2,083.34
Total			$ 3,869.06

Arthur Reed

Attorney Reed's time will be compensated for at a rate of $130 per hour on hours other than those billed at the $50.00 rate (for analysis of computerized data). The $130 rate also is consistent with that approved in Reyes-Garcia.

Hours at $130 rate	124.50		
Hours deleted	- 18.20[2]		
Subtotal	106.30		
33% FLSA factor	x .33		
Subtotal	35.08 x 130.00 per hour =		$ 4,560.40
Hours at $50 rate	44.50		
33% FLSA factor	x .33		
Subtotal	14.69 x 50.00 per hour =		$ 734.50
Travel hours	25.10		
33% FLSA factor	x .33		
Subtotal	8.28 x 35.00 =		$ 289.80
Subtotal			$ 5,584.70
less 35% negative multiplier	5,584.70 x .35 =		- 1,954.65
Total			$ 3,630.05

2. These hours are attributed to settlement. This court believes settlement could have been effected but for plaintiffs' counsel placing different interpretations and alterations on the proposed terms of the settlement agreement. It is the opinion of the court that settlement was effectively scuttled by plaintiffs' counsels' insistence that the settlement be tied into Chandler v. Apple Valley Farms, Inc., No. 84-1573 (M.D. Pa.), which involved a consent decree and provided for injunctive relief.

Paralegal Fees

The paralegal rate will be assessed at $35.00 per hour. The Community Legal Service Fee Schedule (Plaintiffs' Exhibit A) suggests fees ranging from $20.00 to $35.00 per hour. Effective June 21, 1989, those rates changed to $40 to $60 per hour. The paralegal work that extended beyond June 21, 1989 consisted of videotape editing and transporting witnesses for trial. The videotape was not applicable to the FLSA claim. The $35.00 rate is therefore reasonable. It is noted that Attorneys Finnegan and Read charged $35.00 per hour for travel time. The paralegal travel time will be assessed at $15.00 per hour.

The following hours will be deducted: 6.0 hours for videotaping and editing and 10.8 hours for indexing depositions.

Hours claimed	106.20		
Hours deleted	- 16.80		
Subtotal	89.40		
33% FLSA factor	x .33		
Subtotal	29.50	x 35.00 per hour =	$ 1,032.50
Travel hours	17.50		
33% FLSA factor	x .33		
Subtotal	5.78	x 15.00 =	$ 86.70
Subtotal			$ 1,119.40
less 35% negative multiplier		1,119.40 x .35 =	- 391.79
Total			$ 727.61

Costs

All Express Mail costs will be denied. Unless Express Mail was directed by the court, the only other apparent reason for not using regular mail service is to gain extra time. Defendants will not be penalized for plaintiffs' counsels' use of such expensive services.

The allowance for Dr. Cupingood's fees will be $30.00 per day pursuant to West Virginia Univ. Hosps., Inc. v. Casey, No. 89-5165, slip op. at 43-50 (3d Cir. Sept. 5, 1989) (limiting expert fee to same amount provided for lay witnesses by 28 U.S.C. § 1821(b)). Likewise, the witness fee for Joslyn Brown will be reduced to the $30.00 fee allowed for lay witnesses. See 28 U.S.C. § 1821(b).

Deductions will be as follows:

Express Mail	156.13
Difference in Cuppingood fee	815.00
Difference in Brown witness fee	15.00
Total	$ 986.13

Costs Claimed	$ 3,794.94
Less deductions	$ 986.13
Subtotal	$ 2,808.81
FLSA factor	x .33
Total costs	$ 926.91

Recapitulation

Fees and costs awarded to Friends of Farmworkers will be as follows:

John Finnegan	$ 3,869.06
Arthur Read	$ 3,630.05
Paralegal Fees	$ 727.61
Costs	$ 926.91
Total	$ 9,153.63

An appropriate order will be issued.

Sylvia H. Rambo
United States District Judge

Dated: May 17, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ELIZABETH SHARPE; CYNTHIA SHARPE; LEMROY SHARPE; ALBERT SHARPE; DAVID BECKFORD; LEROY BLAKE; ALLEN CAMPBELL; and MABLE WRIGHT,	:	CIVIL ACTION NO. 88-0814
Plaintiffs	:	
v.	:	
PHILIP A. ROTH; APPLE VALLEY FARMS, INC.; and P.A.R. ORCHARDS,	:	
Defendants	:	

FILE
HARRISBURG, PA.

MAY 17 1990

DONALD R. BERRY, CLERK
DEPUTY

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT defendants shall pay plaintiffs' counsel fees and costs in the amount of $9,153.63.

Sylvia H. Rambo
United States District Judge

Dated: May 17, 1990.

Certified from the record
Date 5/17/90
Donald R. Berry, Clerk
By Ann Queenin Michael
Deputy Clerk

AO-72A

RE: CLAIMS OF

Dear

This office represents 150 migrant farmworkers with claims against your farm. These individuals have requested our representation for claims arising because of your violations of farm labor protection and employment related laws in 1986, 1987 and 1988. These claims specifically include the following:

1. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (AWPA), 29 U.S.C. SEC. 1801, ET SEQ.

   a. Failure To Provide Written Disclosure To Recruited Migrants At The Time Of Their Recruitment, AWPA, 29 U.S.C. Sec. 1821(a).

Plaintiffs were not provided written disclosures of the terms and conditions of employment.

   b. Failure To Post Conspicuously The AWPA Poster Setting Forth Plaintiffs' Rights, AWPA, 29 U.S.C. Sec. 1821(b).

The AWPA poster provided by the Secretary of Labor was not displayed.

   c. Failure To Conspicuously Post AWPA Housing Poster, AWPA, 29 U.S.C. Sec. 1821(c).

A statement of the terms and conditions of occupancy of housing was neither posted nor presented to Plaintiffs.

   d. Failure To Maintain Appropriate Wage Records, AWPA, 29 U.S.C. Sec. 1821(d)(1).

On information and belief, wage records containing the required information were not maintained.

EXHIBIT 5

e. Failure To Provide An Itemized Wage Receipt, AWPA, 29 U.S.C. Sec. 1821 d)(2).

Wage receipts containing all the required information were not provided to Plaintiffs.

f. Provision Of False Or Misleading Information, AWPA, 29 U.S.C. Sec. 1821(f).

False or misleading information was provided Plaintiffs with respect to provision of social security and unemployment benefits.

g. Failure To Comply With Working Arrangement, AWPA, 29 U.S.C. Sec. 1822(c).

Working arrangements include the employer's adherence to those state and federal laws which relate to the employment relationship. Your non-payment of social security and unemployment taxes unlawfully denied Plaintiffs the resultant benefits.

h. Failure To Comply With Housing Standards, AWPA, 29 U.S.C. Sec. 1823(a).

The labor camp housing provided to Plaintiffs did not comply with substantive federal and state safety and health standards applicable to that housing.

i. Failure To Certify Housing, AWPA 29 U.S.C. Sec. 1823(b).

Plaintiffs were housed in uncertified labor camp housing in 1986, 1987 and 1988.

j. Failure To Confirm The Registration Of Farm Labor Contractor, AWPA, 29 U.S.C. Sec. 1842.

Plaintiffs have evidence that from 1986 through 1988 the farm used /, a farm labor contractor engaging in unauthorized activities, who is enjoined from doing business as a farm labor contractor in New Jersey.

2. FAIR LABOR STANDARDS ACT (FLSA), 29 U.S.C. SEC. 201, ET SEQ.

On information and belief, Plaintiffs were not paid the minimum wage.

3. FEDERAL INSURANCE CONTRIBUTIONS ACT (FICA), 26 U.S.C. SEC. 3101, ET SEQ.

On information and belief, Defendant failed to pay any social security taxes on the labor of Plaintiffs in 1986, 1987, and 1988, and failed to submit the required forms related to the FICA taxes to the appropriate authorities.

4. FEDERAL UNEMPLOYMENT TAX ACT (FUTA), 26 U.S.C. SEC. 3301, ET SEQ.

On information and belief, Defendant failed to pay any unemployment taxes on the labor of Plaintiffs in 1986, 1987 and 1988, and failed to submit the required forms related to the FUTA taxes to the appropriate authorities.

Under the AWPA, a Plaintiff can obtain actual or statutory damages, whichever is greater, of up to $500.00 per violation of the statute. Under the FLSA, actual damages plus an equal amount of liquidated damages is recoverable for violations of that Act. Given the number of serious violations of the laws involved, we are confident that the damages recovered in litigation of this matter will be substantial.

It is, however, the policy of this office to attempt settlement of matters such as this. I would suggest that you or your attorney arrange to meet or talk with me to begin negotiations aimed at amicable resolution of this matter.

Although I would much prefer to settle this case without litigation, if I do not hear from you or your attorney within 10 days of the date of this letter, I will proceed with filing litigation.

Mr. FRANK. Let me just make a general request now that I hope will be abided by. It has now occurred to me that I am going to have a lot of reading to do about all this so I am going to set aside a weekend or so, and anybody on any side of this issue that wants to send me material, I will read it—and that would include specifically those who might represent the grantees who might want to respond to some very serious charges; and I will read on all sides.

Mr. Cureton, let me ask specifically to you, in the instance where you say people working for Legal Services represented themselves as Immigration workers.

Would it be possible to get specifics on that? I mean, you're talking about the things, which if we can establish them, would, in my judgment, require strong discipline. Obviously, we have problems of confidentiality. But that in the case of people entering someone's room and refusing to leave, have you got statements to that effect? Whatever you've got I would appreciate getting.

Mr. CURETON. Let me answer the question this way: First, I have intentionally not given names of my clients because some of these matters are ongoing litigation and there's a fear of retaliation.

Mr. FRANK. I understand.

Mr. CURETON. Let me, if I may, answer your question further, though, I'd like to.

When we heard about this, we contacted the INS. The INS investigated, called us back and said that we were right, but that they weren't going to do anything about it.

Mr. FRANK. Did they say why they weren't?

Well, I guess it's not the INS's job; it seems to me it might be somebody else's job. I would think it would be a Federal crime to impersonate an INS officer in a law enforcement capacity. But it's not the INS that prosecutes those crimes; that would be the U.S. attorney. I'd like to pursue that.

I'm not surprised the INS didn't do it. What can the INS do? They can't deport an American citizen for breaking the law. These days, they can't deport a non-American citizen for breaking the law, but that's a separate problem. They wouldn't be the appropriate enforcers.

If you've had that investigated, I would ask you—and if you would work with staff—I will ask the INS for those figures. I don't want to tolerate that. I don't want to work very hard to set up a program and have people jeopardize it by that kind of abuse or have innocent citizens subjected to that kind of abuse, or have innocent noncitizens—so I would like that detail.

If you can give it to INS, I assume you can give it to us. We won't put it in the record but I would like to be able to go after it. And that is the kind of thing that I think is an outrage sufficient to warrant some very severe disciplinary action.

Mr. CURETON. Mr. Chairman, I will work with my client and your counsel, too.

Mr. FRANK. All right, I appreciate it.

Let me just make a point about retaliation, because we hear about this fear on both sides, and obviously our writ doesn't run everywhere in the world. But I would again want to say to all sides in this, if anyone has any indication that anybody on any side of

this controversy is suffering retaliations because of anything they've said here, please let us know.

I will ask staff to look into contempt procedures. We have a whole lot of weapons. And I don't think you could find anything that would more unite this Congress in any suggestion that someone was being in any way interfered with—and I mean that—and if there are indications I'd like to have it.

Of course, there are some serious abuses that have been mentioned here, and I am sure some of them have taken place. It may be hard for us to get them all worked out but we would want to deal with this kind of situation.

The complaint which listed the failure to come clean about a pool table; that was not in your submission. Could we get a copy of that? Was that in a formal complaint?

Mr. CURETON. It was not specified in the complaint but it was raised; the complaint was more general than that and listed conclusive——

Mr. FRANK. Is there any documentation of that? It does seem to me——

Mr. CURETON. I believe so.

Mr. FRANK. I would like to see that. You know, my friends in the legal services community have sometimes complained that the appropriation has overly disciplined them for technical violations, and that is a two-edge sword. And yet, people being fined because they didn't tell people there was a pool table, that does not seem to me to be good use of this. And I would like to get some evidence of this thing.

We want to try and make this thing work better, and the more specific you can give us, the better it will be.

I'm not asking for those for the record. I'm asking for those for my and the other members' chance to read them.

Mr. CURETON. Thank you.

Mr. FRANK. I have no questions.

Mr. James.

Mr. JAMES. Thank you for your testimony. I apologize for not being here. I had conflicts where I could not be here for the entire testimony. I was here earlier, then we had the vote, and other things came up so I haven't been here during the entire testimony. I will read it all. But I want to thank you and apologize for not being here for the entire amount—Legal Services is a very important area for all parties involved.

Mr. Ward, there's some factual issue that my attorney has mentioned to me concerning where there were examples that the corporations were representing drug dealers or——

Mr. WARD. Yes, sir, I can answer that. That came up earlier, I think when you were out, in response to some questions from Representative Smith. I can give you one case citation that you may want to take a look at. In *Blackwood* v. *INS,* the citation is 803 F. 2nd 1165, an eleventh circuit decision rendered in 1986, a Florida Rural Legal Services lawyer sued representing a Bahamian trying to block his deportation after being convicted of possessing and trafficking in marijuana.

I've questioned previously before the Florida Bar in IOATA testimony whether that was an appropriate use of Federal funds.

Mr. JAMES. Did he defend in the criminal case, is that what you're saying?

Mr. WARD. No, it's in a deportation case. He had already been convicted in the criminal case. And the defense, by Legal Services, came in at the deportation stage. He was a Bahamian and he was no longer eligible to remain in the United States because he had a felony criminal conviction.

Mr. JAMES. Was he deported?

Mr. WARD. Yes, he was deported. The eleventh circuit didn't spend much time on that case.

Mr. FRANK. May I ask a question?

I would assume that they must have used non-Federal funds for that. If he was an immigrant—I mean, a noncitizen—under deportation, we have a specific statutory ban against any Federal funds in deportation, as I understand it.

We'll check it and find out.

Mr. WARD. I think several of the other cases I mentioned involved representing illegal aliens. That whole *Marquis* case I talked about was all on behalf of illegal aliens at the time it was filed.

Mr. JAMES. I would have been glad to yield had you asked.

I am more interested in the proportionate relationship between that Legal Services' budget and its purpose. It's my understanding that we have $300 million in the budget. So we have $300 million in the budget and if a law firm, so to speak, does a million dollars' worth of work, and we're only dealing with 300 law firms throughout these 50 United States. And yet, all I seem to hear a lot of about is the agricultural type of cases. And in my own private practice it was very difficult to get Legal Services to take cases for indigents, where you, as a private practitioner, couldn't handle it because of the shortage of the personnel for child support. There's many, many child support cases, and a significant percentage of them would qualify—in child support cases or at least in domestic cases, and I find a shortage of funds there.

So I think what we have to do is analyze and see how far we're going to design the rules in such a way to make sure that we get an appropriate allocation—because we all admit $300 million won't do the job for indigents.

So how do we make sure that the $300 million is proportionately assigned to specific categories of cases that the act was originally intended to help with—wills, et cetera; landlord, lease tenants problems, consumer protection problems, et cetera.

Maybe some of you can help me with this. Does anyone know proportionately how much these corporations spend on different types of cases, and where would I find that? In other words, do they do 10 percent of this kind of case, or 10 percent of that kind of case, or 50 percent? Can anyone help with that, comment upon it, from the individual corporations?

STATEMENT OF LIBBY WHITLEY, ASSISTANT DIRECTOR, NATIONAL AFFAIRS, AMERICAN FARM BUREAU FEDERATION

Ms. WHITLEY. Congressman, my name is Libby Whitley. I am the assistant director of national affairs for the American Farm

Bureau here in Washington. Mr. Wilson, Mr. Ward, and Mr. Cureton are here at our invitation today. As you recall, we testified in the hearing last July as the American Farm Bureau.

I think I can respond in part to your question, and that is because of the lack of timekeeping and adequate records kept by the grantees, it is very hard to know what they spend their time on.

Mr. JAMES. I've heard that statement made and that's why I'm pursuing the question. Maybe somebody can make a quantitative or qualitative analysis. In other words, before I make any kind of decision on legislation, I'd expect to see a qualitative and a quantitative analysis of what each corporation does in a given geographic area, because I'm sure that some corporations put a higher percentage on certain types of cases than others; and some do none.

I know in my State if you have an agricultural case, it comes all the way from Belle Glade—the Corporation functions there; the local Legal Aid people don't handle that case. A specialist, I think, handled it, if I'm not mistaken.

So what is the interrelationship between the quantitative work that's done within the State in relationship to the agricultural industry, and how much of it is done on wills, child support, or what have you; you know, landlord-tenant—within each Corporation? How much does each Corporation get, if that's possible? When we don't have time sheets, I don't think that it's absolutely essential to give a quantitative analysis. Or maybe we need legislation to require time sheets, so we can make an evaluation and take direction to make sure that, for example, these corporations aren't spending all of their time on landlord-tenant cases. You don't want them doing all cases in any one area to be fair to the segments of the population that can't afford attorneys, if they have one kind of problem and get no attention; that seems unfortunate, when other areas do get it. I think we need to design legislation to look at, or to analyze that.

I'm not one that's impressed with specific instances because I can give you horror stories in many areas of the law about how it is alleged that one attorney abused this law or not. I've seen it done by private counsel. I've seen it done by the prosecutors. I've seen it happen in all elements of my profession. And I don't think it's more pervasive in one area than another.

But I am interested in allocation of funds appropriately for indigents.

Ms. WHITLEY. Mr. James, as you know, the American Farm Bureau has made securing the passage of the McCollum-Stenholm reform amendments one of its top priorities in 1990. We share your concerns and think that timekeeping and perhaps an expanded authority for the local boards of directors would go a long way toward solving the kind of problems you have just illustrated.

But I think actually addressing the question to the Corporation about what the grantees are presently engaged in may be a more appropriate way to go.

Mr. JAMES. I am going to ask this of the whole panel and everyone take their shot at it.

From a perspective of overseeing the operation, what single change in the current law would each of you suggest? In other

words, what is the most important aspect to get a proportionate control of this problem; if it is a problem?

Mr. WILSON. I think that the people on a local level have to have a capacity on the local boards to effect in a really meaningful way the direction that Legal Services grantee lawyers strike out at.

The situation that I was involved in in Maryland beginning in 1983 where a Legal Services grantee lawyer declared that he was going to see to it that all of the fruit crops of Maryland were harvested by so-called U.S. workers, most of whom were in fact not U.S. workers, but Haitians, but nevertheless they were able to work under the rubric of U.S. worker within the meaning of the regulations.

There were six growers out in Maryland and there was a jurisprudential jihad that was unleashed against these folks; some 17 Federal lawsuits, 175 administrative complaints. In the preceding decade before 1983, we were able to find only a single administrative complaint, and that had been resolved informally at the first level.

Mr. JAMES. Your point is then, what change would you suggest in the law to solve that problem?

Mr. WILSON. Authorization for the local boards to involve themselves in policy decisions with respect to what these Legal Services grantee lawyers——

Mr. JAMES. That bothers me a bit. For example, where you have different segments of Florida—you have one service—what is the relationship? And I'm not sure I understand it. How would a Legal Service in Belle Glade and another in Volusia County be connected, and would you have these attorneys from 200 miles away showing up for this specialty type of case? How would you control that?

In other words, is everyone to have their geographic function? I understood there were corporations that covered the entire State and some covered geographic relationships.

Does anyone understand that?

Mr. WARD. Congressman James, I think I can answer that since I'm in the Florida Bar.

Mr. JAMES. Yes.

Mr. WARD. It gets a little bit confusing in Florida because you've got the Palm Beach County Legal Aid Society, for instance, which is strictly operated by the Palm Beach County Bar Association. That may be the same situation you've got with the Volusia County Bar Association.

This is strictly non-LSC grantee operations, so far as I know. They do get some IOATA funding through the Florida program.

Mr. JAMES. Where does this other group that comes——

Mr. WARD. The other group—Florida Legal Services—Rural Legal Services Corporation is headquartered out of Bartow, and it's a statewide operation.

Mr. JAMES. So it overlaps?

Mr. WARD. They overlap, but what I'm saying is you're really dealing with two different types of Legal Aid Groups. You've got the federally funded Legal Services Corporation, which is what I think we are all complaining about; and then you've got Palm Beach County Legal Aid, which is a Palm Beach County Bar Asso-

ciation group, and my agricultural cooperative has contributed money to that group. That sort of group we get along fine with.

Mr. FRANK. My understanding is that in some of these cases where we have the rural ones, they have a statewide jurisdiction in that specialty area. Am I correct, that there are geographic breakdowns, and then in the rural area there are organizations that have a statewide charter in those States.

Mr. JAMES. If that's the case then you couldn't have local control.

Mr. FRANK. It would have to be a State bar association that would have to do it.

Mr. JAMES. It would be hard, so you would have one organization then, if it's broken down in those two different jurisdictions.

Mr. FRANK. I think, ladies and gentlemen, most of the questions we've heard came from the statewide Rural Legal Assistance, which have the statewide charter in each State as opposed to the geographically based local ones.

Mr. JAMES. Any complaints I've heard, I think, are probably related to the overall State jurisdictional aspects—they're the specialists in those particular areas.

It's hard to allocate dollars then, you'd have to allocate dollars statewide and you'd have to look at the total dollars for the individual area corporations that handle other matters. That in itself shows you treat one kind of case differently than another, I think; or one classification of cases.

It would be interesting to see how much money is devoted in that rural corporation, and how much of their budget is devoted to agricultural cases. Is that all they handle? Or do they handle wills in the rural areas? I don't know know.

Does anyone know the answer to that?

Mr. WARD. They would have to handle the domestic type cases in Belle Glade. There's nobody else there to do it.

Mr. JAMES. But nobody has broken that out to see what is the total dollars devoted, the Federal dollars, in a given area.

Mr. WARD. I know there are a lot of unmet needs in Belle Glade, and I've taken care of some of them myself for poor people. There are a lot of poor people that don't have representation despite a long-time Legal Services presence there in the community.

Mr. JAMES. Of course, all lawyers are faced with many poor people—who they wind up representing a percentage of their time whether they do it on purpose or not. We know there's a great need for legal services for poor people.

Of the $300 million, I'm trying to find out how much is going toward agricultural, how much is going toward the other; and nobody can seem to tell me that.

Has anyone in the room sat down and added up the number of cases filed? It's easy enough to determine in a given circuit—what cases are filed by the Corporation, and what type of cases are they that actually get litigated.

Mr. FRANK. Gentlemen, I think we could probably direct a request. I don't think we asked specifically, but we could have the staff to get a workout, and we could ask all the Rural Legal Assistance ones exactly that—so why don't we do that, and we'll hold the record open for that answer.

[The information follows:]

FUNDING OF MIGRANT LEGAL SERVICES

FY 1990 Appropriations

Total Field Programs, LSC	$292,357,000.00
Total Migrant	$10,088,000.00

LITIGATION AGAINST GROWERS

Complete information is unavailable. The Legal Services Corporation requires that each program report under the "case service reporting system" but has refused to release that information. Therefore, the following information has been gleaned from the draft GAO report and represents only a selection of programs.

Suits against employers, including growers and crewleaders:
The following represents the percentage of cases in which migrant programs took legal action against growers in closed cases. This does not necessarily mean that the cases were resolved by a court judgement but rather that litigation was commenced. The overwhelming majority were settled.

1985-1988
a) Pennsylvania, West Virginia, Virginia, Maryland- 66%

b) The remaining 30 stream states- 23%

c) California- 33%

d) Florida- 14%

e) Texas- 26%

LITIGATION COST, ALL MIGRANT CASES

The last page of the attachment sets out funds expended on all litigation expenses for all cases litigated by the migrant programs. These do not represent only cases against growers but include all other litigation. The figures range from a low of $705.00 for Pennsylvania in 1987 to $165,004.00 for Texas during the same year.

B-

MAGNITUDE OF GRANTEE ACTIVITY BY STATE

Information maintained in LSC's case service reporting system suggested that grantee attorneys represented migrant farmworkers in disputes against growers in the stream states of Maryland, Pennsylvania, Virginia, and West Virginia at a higher percentage than grantee attorneys in other stream states. Between 1985 and 1988, grantees in these four states reported that they took legal actions against growers in about 66 percent of their closed cases.[1] For the same period, grantees in 30 other stream states reported taking legal actions against growers in about 23 percent of their closed cases. Our analysis of data for the base states showed a significantly lower percentage of closed cases with actions against growers in Florida (14 percent) and Texas (26 percent) than the other base state of California (33 percent).

Grantee spokespersons attributed the higher incidence of migrant farmworkers' disputes against growers in Maryland, Pennsylvania, Virginia, and West Virginia to several factors unique to these mid-Atlantic stream states. These factors included the types of crops grown, the states' greater use of farm labor contractors, the characteristics of farmworkers who migrate there, and the

[1]These statistics represent the employment case category of LSC's case service reporting system that, according to grantee officials, primarily involved legal actions against growers and farm labor contractors under MSPA or FLSA.

B-

expertise of grantee legal staff. (For more information on total cases closed and closed employment cases for each of the grantees, see sec. 1.)

PRIORITY-SETTING PROCEDURES AND CASE CLOSURE

LSC regulations required grantee governing boards to (1) periodically assess the need for legal services to migrant farmworkers and review priorities for accepting migrant farmworker cases and (2) annually report these priorities to LSC. Thus, the regulations permit grantees considerable flexibility in setting priorities.

The priority-setting processes followed by the six grantees varied widely. For example, the Texas grantee set separate priorities for migrant cases in each of its branch offices. The Maryland grantee set priorities based on the types of migrant cases it had received over the years. The Florida grantee established the same priorities for accepting migrant cases that it established for accepting cases from its other needy clients. The West Virginia grantee identified all case categories to be priority. LSC officials acknowledged that grantees could avoid critical review during LSC oversight visits by establishing broad priorities that cover the entire range of legal problems encountered by migrant farmworkers.

9

Figure 1.1: Number of Cases Closed by Migrant Grantees (1985-88)

LEGAL ACTIONS AGAINST GROWERS

Grantee officials told us that under LSC's CSR system, migrant cases in the "employment" category primarily involve legal actions against growers and farm labor contractors they employ. The data showed that grantee attorneys in Maryland, Pennsylvania, Virginia, and West Virginia initiated a higher percentage of legal actions against growers in 1985 through 1988 than did grantee attorneys in the 30 other stream states. During this period, the four grantees reported 1,621 closed cases, of which

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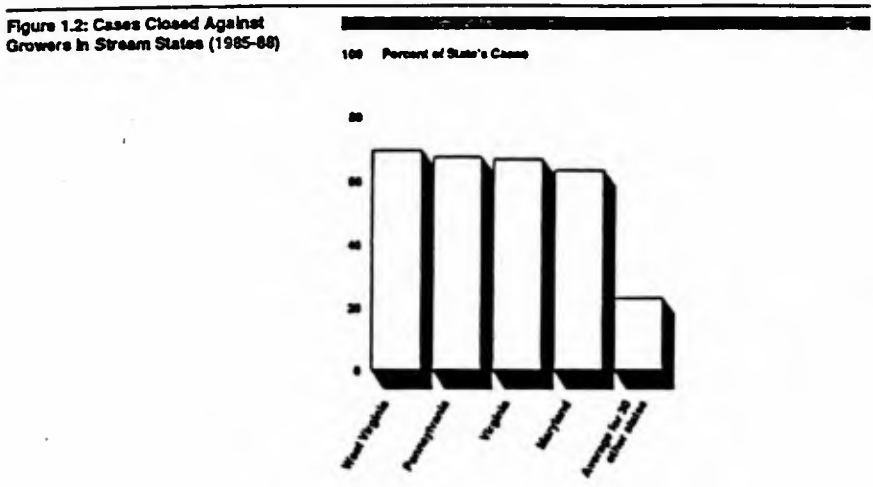
1,068, or about 66 percent, were employment cases. During this same period, migrant grantees in the 30 other stream states reported a total of 33,060 case closures, of which 7,548, or about 23 percent, were employment cases (see fig. 1.2).

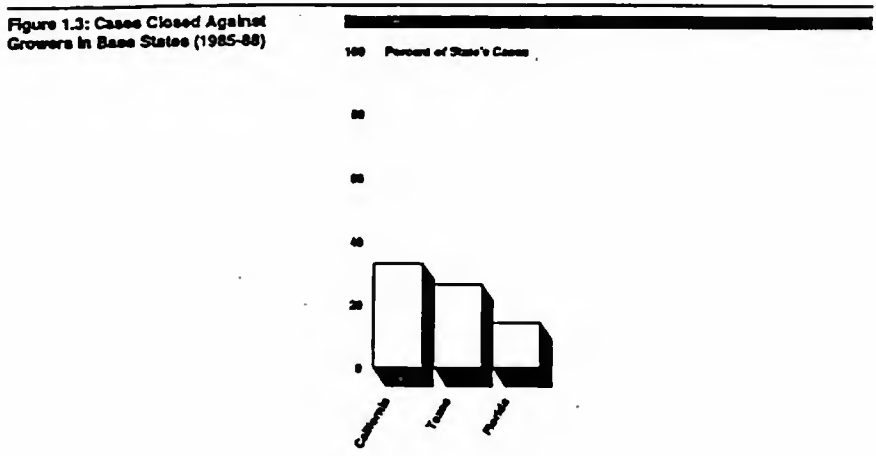
Figure 1.2: Cases Closed Against Growers in Stream States (1985-88)



Our analysis of the data for migrant grantees in Florida and Texas--the two base states in our review--indicated a lower percentage of employment cases than in the other base state--California. During the period 1985 through 1988, Florida reported about 14 percent of its closed cases represented

employment cases and most of these involved farmworkers' disputes with growers. Texas reported about 26 percent and California reported about 33 percent (see fig. 1.3).

Figure 1.3: Cases Closed Against Growers in Base States (1985-88)



GRANTEE OPINIONS ABOUT CASE DISPARITY

We could not determine the reasons for the higher frequency of actions initiated against growers in Maryland, Pennsylvania, Virginia, and West Virginia, and we do not know whether full

access to grantee case files would have enabled us to do so. We asked grantee officials in these states, and grantee officials in Florida and Texas, why attorneys in eastern stream states initiated a greater percentage of legal actions against growers than attorneys in other stream states. They cited the following factors:

-- The expertise of grantee staff affected the number of employment cases handled. Grantees for some of the eastern stream states employed a core of attorneys and paralegals with extensive knowledge of farmworker statutes. Other grantees employed attorneys less able because of comparative lack of experience or training, or because of greater case volume, to take on relatively complex employment litigation in federal court.

-- Agricultural employers in eastern stream states grew more hand-harvested crops. Jobs associated with hand-harvested crops command lower wages and thereby make minimum wage issues more common. In contrast, agricultural employers in western states used more mechanization, and farmworkers were more highly skilled and better paid.

-- The eastern stream of migrant farmworkers consisted predominantly of single males, who generally used employer-provided housing, which was often subject to federal and state

health code inspections. In western states, farmworkers were more likely to migrate with their families and use public housing.

-- The eastern stream states used a greater percentage of farm labor contractors, who have a history of noncompliance with farmworker law. Under current law, growers may be liable as "joint employers" for violations committed by farm labor contractors. In the west, agricultural employers were more likely to contract with farmworkers directly, thus eliminating the "middle man."

-- Case priorities established by grantees had a bearing on the types of cases closed. For example, three of the four stream states in our review assigned a priority to migrant employment cases. Accordingly, the caseload in these states consisted of a higher percentage of employment cases when compared to other stream states.

SECTION 4

TO WHAT EXTENT DO GRANTEE ATTORNEYS ATTEMPT TO AVOID LITIGATION BY USING NEGOTIATION?

Our review of 1987 and 1988 statistics reported on LSC's CSR system showed that over 80 percent of employment cases[a] nationwide that culminated in a settlement or a decision during this period were reported as involving negotiated settlements. The 1988 statistics reported for Maryland, Pennsylvania, Virginia, and West Virginia for employment cases decided or settled with negotiation were lower than the national rate. Without access to grantee files, we could not determine whether attorneys attempted negotiation in all farmworker disputes with growers, nor could we identify the extent to which third-party forms of dispute resolution, such as mediation or arbitration, were used. According to grantee officials, however, they routinely attempted to negotiate disputes before initiating litigation. Such efforts included offer-of-settlement letters, telephone calls, and meetings.

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[a]We based our analysis on the number of employment cases reported by each grantee in LSC's CSR system. Grantee officials told us that employment cases primarily involved legal cases against growers and farm labor contractors.

MSPA PROVISION CONCERNING NEGOTIATION

Section 504(c)(2) of MSPA (29 U.S.C. 1854(c)(2)) provides that in determining the amount of damages to award, courts are authorized to consider whether an attempt was made to resolve the dispute before litigation. In view of this provision, it seems beneficial for both parties to attempt to negotiate a settlement before initiating litigation.

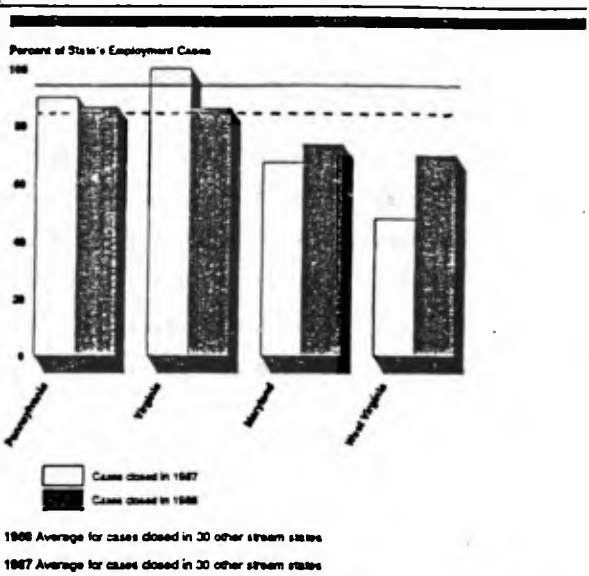
WILLINGNESS OF GRANTEES TO NEGOTIATE

Our review of reported CSR employment data showed, on a nationwide basis, that 860 (80 percent) of the 1,079 cases settled or decided in 1987 and 1,172 (87 percent) of the 1,343 cases settled or decided in 1988 were reported as negotiated settlements with or without litigation. For our analysis, employment cases decided or settled included the following categories of closed cases from the CSR: "negotiated settlement without litigation," "negotiated settlement with litigation," "administrative agency decision," and "court decision."

In 1987 and 1988 migrant grantees providing legal services in the stream states of Pennsylvania and Virginia, negotiated settlements in employment cases at about the same rate as grantees in 30 other stream states. In this same period, migrant grantee in the stream states of Maryland and West Virginia,

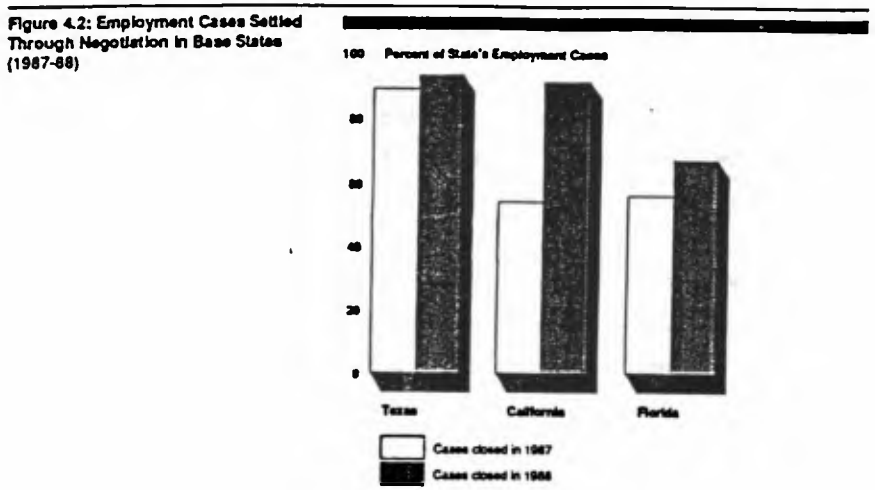
however, decided or settled employment cases with negotiation at a lower rate than grantees in 30 other stream states. (see fig. 4.1).

Figure 4.1: Employment Cases Settled Through Negotiation in Stream States (1987-88)



Concerning the base states, in 1988, migrant grantees in Florida generally negotiated settlements in employment cases at a lower rate than did the grantees in California and Texas (see fig. 4.2).

Figure 4.2: Employment Cases Settled Through Negotiation in Base States (1987-88)



Grantee officials suggested that CSR statistics may underestimate the actual extent of negotiation as cases closed for other reasons, such as client refusal to proceed with a case or insufficient merit to proceed with a case, could also involve efforts at negotiation. Also, cases ultimately decided in court or by an administrative agency may involve negotiation. Under LSC's CSR system, grantees do not identify third-party forms of dispute resolution, such as mediation or arbitration.

Although grantees had no written policies, officials told us that

they made efforts at prelitigation settlement in virtually every farmworker case. They indicated that their normal practice involves sending a letter to the grower outlining the violations, requesting payment, and inviting him or his attorney to respond. Settlement efforts also included telephone calls and informal meetings. One grantee considered the failure to negotiate to be malpractice and, another, a breach of the attorney's fiduciary responsibility.

Our review of 43 offer-of-settlement letters disclosed that, in 41 instances, the grantee attorney invited the grower or his attorney to discuss and settle the issues. The other two letters contained no clear request to discuss settlement.

SECTION 6

WHAT PORTION OF LSC MIGRANT GRANTS ARE SPENT FOR LITIGATION?

According to audited financial statements for 1987 and 1988, expenditures by LSC migrant grantees for litigation ranged up to $165,004 a year for the six grantees in our review. We could not determine the portion of these funds spent in litigating cases against growers.

LSC FUNDS USED FOR LITIGATION

According to LSC's Audit and Accounting Guide for Recipients and Auditors, grantees are expected to track grant funds spent on litigation costs. Litigation costs include the costs of recording depositions and transcripts, filing fees, expert witnesses, and any other litigation expenses paid by the grantee rather than the client.

To determine the amount of LSC migrant funds that each of the six grantees spent on litigation, we reviewed audited financial statements for 1987 and 1988. Table 6.1 shows the amount of LSC funds used for litigation in calendar years 1987 and 1988.

Table 6.1: LSC Migrant Funds Used for Litigation

Grantee	1987	1988
Friends of Farmworkers, Inc. (FOF)	$ 705	$2,052*
West Virginia Legal Services Plan, Inc. (WVLSP)	2,175	1,335
Peninsula Legal Aid Center, Inc. (PLAC)	3,665	(1,089)
Legal Aid Bureau, Inc. (LAB)	7,257	2,509
Florida Rural Legal Services, Inc. (FRLS)	4,503	23,238
Texas Rural Legal Aid, Inc. (TRLA)	165,004	93,667

*Obtained from grantee's 1989 refunding application.

Because grantees do not maintain data on litigation costs by type of litigant, we could not determine the portion of these funds spent in litigating cases against growers. Litigation costs were also paid with private funds, but we did not analyze the use of these funds.

Mr. JAMES. Who would get our answers for us, do we know?

Mr. FRANK. We could write to the Corporation and we could also write to each Rural Legal Assistance organization.

Mr. JAMES. And we could get a quantitative and a qualitative amount, dollarwise, in estimate terms?

Mr. FRANK. I suggest our staffs work together to draft that questionnaire.

I think we would also probably want to make sure we ask the questions. We'll take what you've got and we'll also formulate our questions because it might be somewhat different.

Mr. WARD. I think we could put together very easily for you a list of the reported cases, and you'll get a very good idea, I think, of what kind of work Legal Services is doing. I can certainly provide that to you for the State of Florida particularly.

Mr. JAMES. It will also be interesting to see what were the ultimate judgments and what types of actions were involved, and how many hours were spent to get a $3,000 fine—you know, if you get it refined in that area.

The accusation simply has been, as far as I can tell, well, look, there are violations; that bring about this kind of penalty, but it's not a $200,000 effort that should be spent by Legal Services to go after the $3,000. You drop a dime in the grate; you don't tear up the street to get the dime—that sort of concern.

The other concern is because of the toughness of the statutes, they have for minor violations, they have tough penalties in some cases. Have you heard that expressed by the growers, that it's disproportionate to the nature of the wrong?

But then again, is that not a problem with our Federal statutes? It has nothing to do with the Corporation, except that they may be taking advantage of it, but I don't know.,

Mr. CURETON. I think, Mr. James, that that is exactly the heart of the problem, that there's no incentive to not litigate. They have every incentive to litigate; they do not have economic restraints on their litigation.

Mr. JAMES. Because they're paid a salary no matter whatever fine they get goes in their coffers?

Mr. CURETON. Or whatever money they get——

Mr. JAMES. For attorney's fees.

Mr. CURETON [continuing]. And they can allocate that to wherever they want. The grantees we deal with do nothing but farm labor work and they emphasize—everything I've seen are class action litigation directed against the farmers, basically.

Mr. JAMES. OK. In the McCollum amendment—this I have an interest in—should we effectively attempt to legislate ethics different for those cases than we would for others; for example, solicitation? Shouldn't we go by the general solicitation laws of the Florida Bar or the American Bar Association? Why do we need that provision in this statute on solicitation?

Ms. WHITLEY. Congressman, do you mind if I respond?

Mr. JAMES. No, please do, anyone.

Ms. WHITLEY. I have worked most closely with this issue at the Federal level or legislative level. I'd like to say, first of all, we haven't seen this year's version of the McCollum-Stenholm amendment as yet. It hasn't been introduced by either of its two sponsors

from last year. So I think to a certain extent we're probably assuming that it's going to look the same, perhaps, in 1990, and I'm not sure that's the case.

I think both Congressmen have been working with a variety of groups, and they've certainly been talking to the firm here and other agricultural groups, other interest groups—people who have expressed concerns about the way the amendment was structured last year.

So I think we may be making a mistake to assume that last year's provisions, whatever it is, whether it's solicitation or something else, is going to look the same this year as it did last year.

Mr. JAMES. When we get to the issue of the solicitation, should we even address that—whether it did last year or not?

Ms. WHITLEY. Absolutely. I think certainly in Pennsylvania, as Mr. Cureton has indicated, that may be one of the greatest problems in Pennsylvania, is solicitation which——

Mr. JAMES. May I ask you this—assuming that's the problem, why should we address that differently than it's otherwise ethically addressed by the respective bar? That's the ultimate question.

Ms. WHITLEY. I think it may very well be an excellent approach to take, to make it uniform—in McCollum-Stenholm—to take the bar association language.

But in Pennsylvania, for instance, solicitation is the major problem.

Mr. JAMES. What I'm saying is, if you have the bar association there and if you have an ethics complaint, file it. Some things are a violation of the law that is also a breach of ethics, and there's a lot of overlapping.

But if you are really concerned about solicitation generally within the jurisdiction of the respective bar association and if they are in fact violating the ethics of that bar, it would seem the proper remedy if someone would file the complaint.

So why does not that procedure work as opposed to making another Federal law that requires a Federal prosecution?

Mr. CURETON. If I may, as one who has been involved in these cases, it's a very difficult question I think that Congress is faced with—the abuse is widespread. But it's very, very difficult for a litigator or a grower to ferret out. We very seldom have the opportunity to ask this grower and ask the farmworker what happened; and as soon as we try, we are interfering with the attorney-client privilege, and we get zero.

Mr. JAMES. Not to argue with you, but that doesn't answer the question. No matter what law we pass here it is not going to make it one bit easier to ferret out.

So if you've got an existing law here, what good is it to write another law on top of a law to prevent an act that will be just as hard to ferret out?

Mr. CURETON. I think maybe the penalties for ferreting it out might be greater than you see in the ethics——

Mr. JAMES. Or losing your license is no small penalty if you persist.

Mr. CURETON. In the Commonwealth of Pennsylvania that hasn't happened. Disenfranchising a grantee for abuse might be a lot more serious and a realistic approach.

Mr. JAMES. What you're submitting is that if you could ferret out the information that this would be grounds for pulling their license if you catch them in solicitation or in violation of the bar rules. For example, in most States you can advertise on television, OK? That's solicitation.

We used to not do that, but that is done now. All right? But it is my understanding you can't go out and personally solicit, in most States.

Mr. CURETON. And that's what is going on here.

Mr. JAMES. And that's what you say is going on here.

If that is happening indeed then you would think someone would have filed a complaint, including one of the defendants; but that is widespread.

Do you have examples of the complaint being filed and a bar association dealing with it?

Mr. CURETON. I am engaged in ongoing litigation where it's a concern and for tactical and other reasons with my clients.

Mr. JAMES. I have heard the complaint myself. I'm just saying we could pass a law and perhaps it would be important to look at their license if you could prove it. But if you could prove it, you could also get the individual lawyers disbarred; then the Corporation could just hire another lawyer, you could contend, I suppose, and still stay alive. You could pick out one Indian at a time or one lawyer at a time if you could prove it.

Yes?

Mr. WARD. One problem you have with making ethical charges against an attorney who is opposing you in litigation is that you get accused of making the ethical charge in order to try to obtain a tactical advantage in litigation. I have a very close friend that that happened to in non-LSC grantee related activities.

So you have to walk a very thin tightrope in making an ethical charge against any attorney who is opposing you in litigation, so it doesn't provide a very good vehicle; you're risking your own license by filing an ethical charge.

Mr. JAMES. I understand that. So what you're saying then is, if there is a violation—if we say, you can't solicit, then that would be enough to stop the Corporation from encouraging it as a matter of policy because then they would be afraid their funds would be cut off and you wouldn't be involved in this one-on-one attorney scenario or situation which would at least slow down the solicitation by the Corporation as a policy matter.

And, of course, if you catch an attorney individually soliciting, he can be dealt with in an ethical framework. But if the Corporation itself allows solicitation or encourages it, then it should affect their funds. I understand that. I had to work myself through it and see the distinction between the two.

Thank you. I've taken so much time and I apologize. I want to thank you for your information.

Mr. FRANK. The gentleman shouldn't apologize. I think that was a very fruitful line, and that's right, it doesn't make clear that we have to differentiate between things that are one grantee policy to an individual attorney.

But the other question that was suggested by what Mr. James said, and you said so and I agree, you wouldn't—you would be careful about filing that yourself.

But am I correct, I would think in most bar associations there is no standing requirement; that is, you don't have to be the personally aggrieved party to file that ethical complaint. So where you had that pattern, a nonlitigant could file the complaint.

And one of the things I think we would ask, and I would ask the staff to do this, is let's solicit from the bar association, particularly in those areas where Rural Legal Assistance programs operate, and let's see what volume of complaints we've gotten and what's been done about them. We may want to incorporate by reference some of the rules on solicitation as a possibility.

We can deal with the penalties separately. I don't want to be conclusive on this but what Mr. James has said is very useful for us.

I have no further questions. I very much appreciate your testimony and anything further that you want to submit.

Mr. Berman.

Mr. Berman, a nonmember of the subcommittee has asked unanimous consent to be able to say something.

He has been a model of constraint so I think we will let him do it.

[Laughter.]

Mr. BERMAN. If I can ask questions then——

Mr. JAMES. I think that was a witness a few minutes ago.

Mr. BERMAN. I was, right.

Mr. FRANK. A double threat today.

Mr. BERMAN. Mr. Wilson set forth a series of situations where the Department of Labor was sued by the Legal Services Corporations—I'd like to introduce into the record a series of cases where growers have sued the Department of Labor because they don't like what the Department of Labor has been doing in setting wages. I think that should be in the record, if that would be all right.

Mr. FRANK. Without objection.

[The document follows:]

CASES BROUGHT BY H-2 GROWERS TO AVOID REGULATIONS

During the 1980's, over 350 H-2 growers, individually and through their associations, have sued year after year to avoid complying with DOL regulations setting minimum benefits for U.S. (and H-2) workers and to avoid keeping promises of compliance they made.

A. 1983

1. Virginia Agricultural Growers Ass'n v. Donovan, 756 F.2d 1025 (4th Cir. 1985)
   a. Association of VA H-2 tobacco growers sue to avoid requirement that Domestic Farmworkers be hired during first half of H-2 contract (50% rule)
   b. Growers lose

2. Virginia Agricultural Ass'n v. Donovan, 774 F.2d 89 (4th Cir. 1985)
   a. VA H-2 tobacco growers, H-2 apple growers from VA, MD and NY sue to avoid paying minimum adverse effect wage rate set by DOL
   b. Growers lose
   c. Wilson one of attorneys for growers

3. Florida Fruit and Vegetable Ass'n v. Brock, 771 F.2d 1455 (11th Cir. 1985)
   a. H-2 Florida Sugar Cane growers sue to avoid paying minimum adverse effect wage rate set by DOL
   b. Growers lose

4. Shoreham Coop. Apple Producers Ass'n v. Donovan, 764 F.2d 135 (2nd Cir. 1985)
   a. New England H-2 apple growers sue to avoid paying minimum adverse effect wage rate set by DOL
   b. Growers lose

5. Tri-County Growers, Inc. v. Donovan (N.D.WV)
   a. WV H-2 apple growers sue to avoid paying back piece wage rates they had promised to pay
   b. Case dismissed by growers; wages paid in 1989

B. 1985

1. Frederick County Fruit Growers Ass'n, Inc. v. McLaughlin, 703 F.Supp. 1021 (D.D.C. 1989)
   a. 300+ H-2 apple growers from VA, WV, MD, NY and New England refuse to pay piece rate wage required by law after promising to pay; pay approx. 20% less than legal minimum; sue DOL to avoid promise to pay
   b. Court awards back wages, saying growers actions

were "self-serving and duplicitous" (at p. 1030)
c. Wilson represents growers in this case

2. Washington County Fruit Growers Ass'n v. Brock, (D.Md)
a. Maryland apple growers sue to stop the free, informal mediation and administrative complaint system operated by the U.S. Department of Labor
b. After being denied preliminary injunction, growers dismissed case

C. 1985-1986

1. Feller v. Brock, 802 F.2d 722 (4th Cir. 1986)
a. WV H-2 apple growers sue to avoid paying minimum piece wage rate set by DOL in 1985 and 1986
b. Growers lose

D. 1986

1. Senseny South Corp. v. DOL (W.D.Va. 1986)
a. 20 VA H-2 apple growers sue to avoid requirement that all wage terms be stated in job offer
b. Growers obtained temporary injunction; dismissed case after season
c. Wilson was lawyer for growers

E. 1987

1. Tri-County Growers, Inc. v. Clayton (N.D.WV 1988)
a. Association of WV H-2 apple growers sue to avoid paying penalties assessed by DOL for refusing to hire U.S. workers
b. Case dismissed after growers settle with workers

F. 1988

1. Tri-County Growers, Inc. v. Ostine, (N.D.WV 1988)
a. Association of WV H-2 apple growers sue to avoid paying penalties assessed by DOL for refusing to pay minimum benefits to U.S. workers
b. Case dismissed after growers settle with workers

MARYLAND GROWERS

A. ORCHARD CLOSINGS. The Maryland Orchards closed primarily because they did not adopt modern horticultural practices needed to compete
   1. Example--didn't replace old, tall trees with dwarf trees (which have higher yield, and are better for fresh fruit market)
   2. This is the conclusion of the MD University apple expert. Hagerstown, MD, Herald-Mail (July 9, 1989).

B. LADDER TEST CASE. After a trial, the Judge found that the orchard had a pre-employment test which "did not reasonably and fairly test [job applicants] for job-related skills"
   1. Judge found that H-2 workers were given a chance to prove themselves on the job, while that chance was denied to U.S. workers
   2. Bernett v. Hepburn Orchards, Inc., 106 Lab.Cas. (CCH) ¶ 34,913 (D.MD)

C Washington County Fruit Growers Ass'n v. Brock, (D.Md)
   a. Maryland apple growers sue to stop the free, informal mediation and administrative complaint system operated by the U.S. Department of Labor
   b. Growers were denied preliminary injunction
   c. Growers claimed high litigation costs were putting them out of business
      i. Were asked for proof under court rules
      ii. Rather than provide proof, growers dismissed case
   d. Result: growers lost

Mr. BERMAN. I forgot that I wasn't a member of the subcommittee, I think I will just stop here.

Mr. FRANK. I thank the gentleman. He will have plenty of opportunity at the full committee to deal with this.

Gentleman, ma'am, thank you. We remain open for more information.

This is the last hearing we plan to have but we expect to hear from a lot of you on information; we will be putting a lot more in the record and running up the Government's printing cost, but many of us will be reading it so feel free to stay in touch with the staff members.

The hearing is adjourned.

[Whereupon, at 1:10 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER WITH ATTACHMENTS FROM KAREN DETAMORE, EXECUTIVE DIRECTOR, FRIENDS OF FARMWORKERS, INC., TO BELLE CUMMINS, JUNE 12, 1990

FRIENDS OF FARMWORKERS, INC.
Legal Services for Farmworkers
3156 Kensington Avenue, 4th Floor
Philadelphia, PA 19134-2483
215-427-4885

☐ 19 W. High Street, 2nd Floor
Gettysburg, PA 17325
717-337-1544

☐ P.O. Box 877
104 E. State Street, 2nd Floor
Kennett Square, PA 19348
215-444-9331

June 12, 1990

Belle Cummins
Administrative Law and Governmental Relations Subcommittee
House Judiciary Committee
United States House of Representatives
B-351-A Rayburn House Office Building
Washington, D.C. 20515

Dear Ms. Cummins:

Enclosed, pursuant to your request, is a copy of the letter we have just received from the Immigration and Naturalization Service relating to allegations made by Jerald Cureton that one or more members of our staff impersonated an INS official. He made these allegations in his written and oral statements to the House Judiciary Committee Subcommittee on Administrative Law and Governmental Relations Oversight Hearing on the Legal Services Corporation on May 23, 1990.

As you may recall, he claimed that employees of ours had "passed themselves off as immigration officials to gain the workers confidence." In embellishing on his tale in his oral testimony, Mr. Cureton claimed that there had been an official Immigration and Naturalization Service (INS) investigation which had concluded that the incident occurred, but that a decision had been made not to prosecute. This is absolutely untrue.

No employee of Friends of Farmworkers has ever impersonated an INS official or anyone else. As you can see, the INS has confirmed that they have no records of any such investigation. (I have enclosed a copy of our Freedom Of Information Act request for any documents of any kind regarding this alleged incident in addition to their response.)

These allegations, besides being untrue, are simply incredible to most people with any experience dealing with migrant farmworkers. This is because of their experience that immigration officials generally inspire fear, not trust, among farmworkers, despite the legalization of hundreds of thousands of undocumented farmworkers following the adoption of the Immigration Reform and Control Act of 1986.

Mr. Cureton's statements were filled with other misrepresentations and distortions, many of which concerned our program. I am preparing a response to his testimony which addresses these and which I hope to have to you by the end of the week.

Thank you for your concern about these issues. Please contact me if you have any questions or if you wish any additional information.

Sincerely,

Karen Detamore

Karen Detamore
Executive Director

U.S. Department of Justice

Immigration and Naturalization Service

Eastern Regional Office
Burlington, Vermont 05401

BUR90-0089

June 4, 1990

Karen Detamore
Executive Director
Friends of Farmworkers, Inc.
3156 Kensington Avenue
45h Floor
Philadelphia, PA 19134-2483

Subject: Investigation - Impersonation of
I.N.S. Officer
Freedom of Information Act Request

Dear Ms. Detamore:

Your request was received in this office on May 29, 1990. We have completed our search for records that relate to your request and none were found.

In addition, the Immigration Office in Philadelphia was contacted, and a search was conducted for any records at that location which would be responsive to your request; that search also produced negative results.

If you still believe that we have records that relate to the information you are seeking and you can provide us with additional information, we will conduct another search.

Sincerely,

James W. Buckley
Director, Office of
Records and Information

FRIENDS OF FARMWORKERS, INC.
Legal Services for Farmworkers
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215-444-9331

May 24, 1990

Freedom Of Information Act/ Privacy Unit
Immigration and Naturalization Service
Regional Office
Federal Building
Burlington, Vermont 05401

Dear Sir or Madam:

This is a request under the Freedom of Information Act as amended (5 U.S.C., section 552).

The request is for records regarding an investigation alleged to have taken place of an alleged impersonation of an Immigration and Naturalization Service official by an employee of a legal services program. An allegation has been make than in or about October 1988 one or more paralegal employees of a legal services program in Pennsylvania, while conducting outreach to a farm labor camp, claimed to be immigration official(s) to farmworkers she or they interviewed. The person making this allegation has further claimed that there was an INS investigation of this alleged incidant.

This request is for any and all memoranda, studies, reports, evaluations, correspondence or other records within your custody or control concerning any such incident and/or any such investigation. It is also for information known to you as to the existence of any additional memoranda, reports, studies, evaluations correspondence or other records concerning any such incident and/or investigation.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. We therefore request that, if you determine that some portions of the requested reports are exempt, you provide us immediately with a copy of the remainder of the report. We, of course, reserve our right to appeal any such decisions. If you determine that some or all of the requested materials are exempt from release, we would appreciate your advising us as to which exemption(s) you believe cover(s) the material which you are not releasing.

We ere prepared to pey reasonable coats for loceting and reproducing the requeatad meteriale. As you know, the amended Act permits you to reduce or weive the feea if it "ia in the public intereat becauae furnishing the information can ba conaidered as primarily benefitting the public." We believe this requeat clearly fits within this category. We ara a publically funded, non-profit legal aarvicea program, providing legal aervices to indigent migrant and aeasonal farmworkera. This information is requeated to clear the public record concerning very aerious allegations that have been mada concerning our program. Wa therefore aak you to waive any feea. If you rule otherwisa, pleaaa adviae ua of an eatimate if the cost ia in exceas of $50.

As provided for in the amended Act, wa will expect to receive a reply within ten working daya.

Thank you for your aaaiatance.

Sincerely,

Karan Detamore
Executive Director

APPENDIX 2.—LETTER FROM F. WM. MCCALPIN TO REPRESENTATIVE TOM CAMPBELL, MAY 30, 1980

May 30, 1980

Hon. Tom Campbell
516 Cannon House Office Building
Washington, DC 20515

Dear Mr. Campbell:

I am sorry that we did not have the opportunity during my recent stay in Washington to continue the colloquy we had Wednesday morning, May 21, at the Judiciary Subcommittee hearing. I have since read the Grove City decision for the first time and now have some views in addition to, and probably different from, those I then expressed.

I begin by accepting the proposition as enunciated by the Supreme Court that the Congress may attach reasonable conditions to a grant of federal funds. The problem in Grove City seems to have been that the Congressional enactment was not clear with respect to the extent of the condition attached to the grant of Title IX funds. The Court's exegesis was an attempt to ascertain that intent.

All opinions seem to agree that the intent of the underlying legislation was to outlaw discrimination in educational institutions. The differences arose as the justices attempted to determine whether the federal grant condition would bar discrimination in every phase of the college operations or only in a specific program. The majority limited the reach of the ban to the financial aid program; the dissent would have extended it college wide. The disputed question whether the college was in fact receiving federal assistance is not germane to the application of Grove City to LSC funding.

The law seems to be that any conditions attached by Congress to a grant of federal funds must be reasonable. I submit that conditions

are reasonable only when they are rational and consistent with the basic purpose of the program for which funds are granted. In Grove City that basic policy was to prohibit discrimination and attaching the condition with a broad reach would support that objective. The underlying purpose of the Legal Services Corporation Act is to facilitate access to justice by poor persons. Section 1010(c) restricting the use of private funds does not support that purpose.

While Congress may legitimately restrict scarce federal funds to limited areas of access to justice, there is no reason consistent with the purpose of the Act why it should bar the use of private funds to give the near poor, elderly, aliens or other classes of citizens access to justice. Even if Congress decides that federal funds should not be used in desegregation or Selective Service cases, Is that a reason to deny poor people access to the courts in such matters using non-federal funds?

My conclusion is that while attaching a broad-reaching condition of non-discrimation to federal assistance in Grove City supported the purpose of the statute and was therefore appropriate, attaching a broad prohibition on the use of private funds in the Legal Services Corporation Act disserves the purpose of the legislation and is not appropriate. It is not a reasonable condition. Incidentally, I now believe that the dissent had the better argument in Grove City.

The foregoing analysis does not reach the constitutional argument advanced by some against § 1010(c). In that connection I think you may find the attached September 14, 1987, letter from Professor Rosenthal to Senators Hollings and Rudman informative and persuasive. Today's New York

Times report that the Supreme Court has granted certiorari in Rust v. Sullivan suggests that this issue may well be decided there next term. It is noteworthy, as that report also indicates, that in enacting Title X the Congress apparently did not limit the use of private funds to provide abortion counseling.

In a way I am grateful to you for raising the Grove City argument with me. I only wish that I had read it before our colloquy rather than afterwards. In any event I do not believe that what Congress--or the Supreme Court--did in that situation is any precedent for Congress to limit the use of private funds contributed to legal services programs to facilitate poor people's access to justice. If you have the opportunity I would appreciate your further comments.

Very truly yours,

F. Wm. McCalpin

FWM:nc

Enc.

cc: Hon. Barney Frank

APPENDIX 3.—LETTER FROM ALBERT J. ROSENTHAL AND MAURICE T. MOORE TO SENATORS HOLLINGS AND RUDMAN, SEPTEMBER 14, 1987

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW [illegible]

September 14, 1987

Senators Ernest F. Hollings, Chairman and
Senator Warren B. Rudman, Ranking Minority Member,
Subcommittee on Commerce, Justice, State, the
Judiciary and Related Agencies
United States Senate Committee on Appropriations
Washington, D.C. 20510-6025

Dear Senators Hollings and Rudman:

As a law professor, I have had a scholarly interest in the constitutional questions arising out of the practice of placing conditions upon government spending. Some of these questions are involved in regulations of the Legal Services Corporation prohibiting certain activities, funded entirely from private sources, of LSC grantees. Among these activities are some that would surely be protected by the First Amendment against direct regulation by any arm of government -- lobbying, direct and grassroots, and certain training programs, among others.

I would like to confine my observations to constitutional issues, although there may also be problems as to the consistency of these regulations, at least in part, with the underlying statutes.

Freedom of speech has often been stated by the Supreme Court to have a "preferred position" among constitutionally protected rights, "the indispensible condition of nearly every other form of freedom." And among types of speech, debate on issues of government lawmaking is at the very core. The Court has repeatedly held that such speech may be curtailed only upon a showing of a compelling overriding interest, and even then the narrowest possible means must be employed to avoid any unnecessary abridgement. See, e.g., Palko v. Connecticut, 302 U.S. 319, 327 (1937); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4; First National Bank v. Bellotti, 435 U.S. 756 (1978).

On the other hand, the government is not required to finance the exercise of every constitutionally protected right; this was held specifically with respect to lobbying, in Taxation with Representation v. Regan, 461 U.S. 540 (1983). Thus, there is no serious question as to the validity of the decision by Congress to forbid use of federal funds to finance lobbying by LSC grantees: the problem arises when the restriction is extended to bar an organization that receives LSC funds from using non-government funds to pay for its lobbying or other forms of communication generally protected by the First Amendment.

There is a great difference between prescribing the purposes for which government funds may or may not be employed, and using a grantee's acceptance of government funds as a foot in the door to forbid his exercise of constitutionally protected rights through other means. For example, the government may condition a scholarship on the student's continuing his or her studies; but may the government prescribe that the scholarship is forfeited if the student votes?

There has been at least a century of debate over whether it is constitutional for federal or state governments to impose conditions upon their spending that have the effect of interfering with the exercise of rights that could not have been validly infringed by direct regulation. Sweeping answers -- "always" or "never" -- have gradually been discarded. In the last few years, the Supreme Court has ruled on three cases which, taken together, strongly support the conclusion that the LSC regulations are unconstitutional.

In FCC v. League of Women Voters, 468 U.S. 364 (1984), public radio and television stations that received some government funding were forbidden from broadcasting editorials even though the government money was not used for that purpose; the Court held this to be an unconstitutional restraint on freedom of expression.

LSC apparently argues, however, that it needs to forbid the use of money from other sources for activities which may not be paid for out of government funds, in order to prevent juggling of accounts by such devices as depleting the government money for permitted purposes (e.g., overhead) and designating the private money for the forbidden types of communication. If this were the only way to prevent evasion of the restriction on use of government funds, a court would have to balance the governmental interest in not paying for lobbying against the interest in free speech. But it is not the only way. There is nothing to prevent the enforcement of strict accounting requirements, that government funds be segregated from other money. Indeed, LSC has issued just such regulations to prevent financial chicanery; they also provide that the recipient has the burden of proving that it employs proper accounting methods. These regulations are published at 45 CFR Part 1630. There is no reason to believe that they have not worked or are unworkable.

Any possible argument that prohibition is easier for LSC to enforce than is the auditing of a grantee's account is clearly insufficient: "As to ease of enforcement, the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights." Carey v. Population Services Int'l, 431 U.S. 678, 691 (1977).

A closely analogous question arose in connection with an Arizona law that denied state funding to any family planning agency that engaged in abortion-related activities even with funds from other sources. It was clear that the state was not constitutionally required to pay for abortions; the issue was whether it could condition grants for purposes other than abortion on the recipients' not performing abortions. On a showing by the recipient that it could and did keep the state funds segregated from privately provided money, the U.S. Court of Appeals for the 9th Circuit affirmed a summary judgment that the statute was unconstitutional. Planned Parenthood v. Arizona, 789 F.2d 1348 (1986). And the Supreme Court unanimously affirmed without opinion. 107 S.Ct. 391 (1986). (This was an affirmance, not a mere denial of certiorari.)

The Supreme Court pointed out in Taxation with Representation, 461 U.S. at 544, that an organization that wanted to lobby and still remain eligible for tax-deductible contributions could have done so by spinning off its lobbying activities into a separate entity funded by non-deductible contributions. The Court confirmed this in League of Women Voters, 468 U.S. at 399-401, distinguishing the prior case on the ground that a broadcaster could not split itself up.

In Planned Parenthood, segregation of public from private funds was feasible and had been done; only private funds paid for abortions. The infringement could therefore not be justified on the basis of making sure that state funds did not pay for abortions. The condition was therefore an unreasonable restraint on a constitutionally protected right, and invalid.

Taking these three cases -- Taxation with Representation; League of Women Voters; and Planned Parenthood - together, some conclusions seem clear:

1. Where segregation of funds (within one organization or by splitting) is feasible but the recipient has not done so, prohibitions on the use of public funds may be extended to private funds as well (Taxation with Representation).

2. Where the recipient has segregated the funds, however, it is unconstitutional to apply the prohibition to privately-funded activities (Planned Parenthood).

3. If segregation of funds is not feasible, perhaps a balancing of values must be made, with great weight accorded to freedom of expression; but if the reason segregation is not feasible is a government regulation that could be changed, then carrying over the restriction to the use of non-government funds

is not the least restrictive alternative available, and is invalid (League of Women Voters).

So far as I have been informed, LSC grantees have kept proper accounts and complied with its regulations. If any have not, LSC has ample authority to cut off their funds. Hence, Planned Parenthood applies and the restriction on use of private funds is unconstitutional.

Even if it were true that segregation of funds within a single organization was insufficient assurance against juggling of accounts, the obvious alternative would be to spin off the challenged activities into a separate organization with its own accounts. But LSC itself has thrown a roadblock in the way of such a solution to its professed problem: its "Audit and Accounting Guide," dated January 1, 1986, section 1-7, effectively prevents the use of separate organizations with separate accounts as a way of ensuring isolation of government funds from possible use for forbidden purposes. As in League of Women Voters, there is a less restrictive alternative, and the restraint on communication paid for out of non-government money appears to be unconstitutional.

I hope that these comments may be of help to you and to the Subcommittee.

Very truly yours,

AJR

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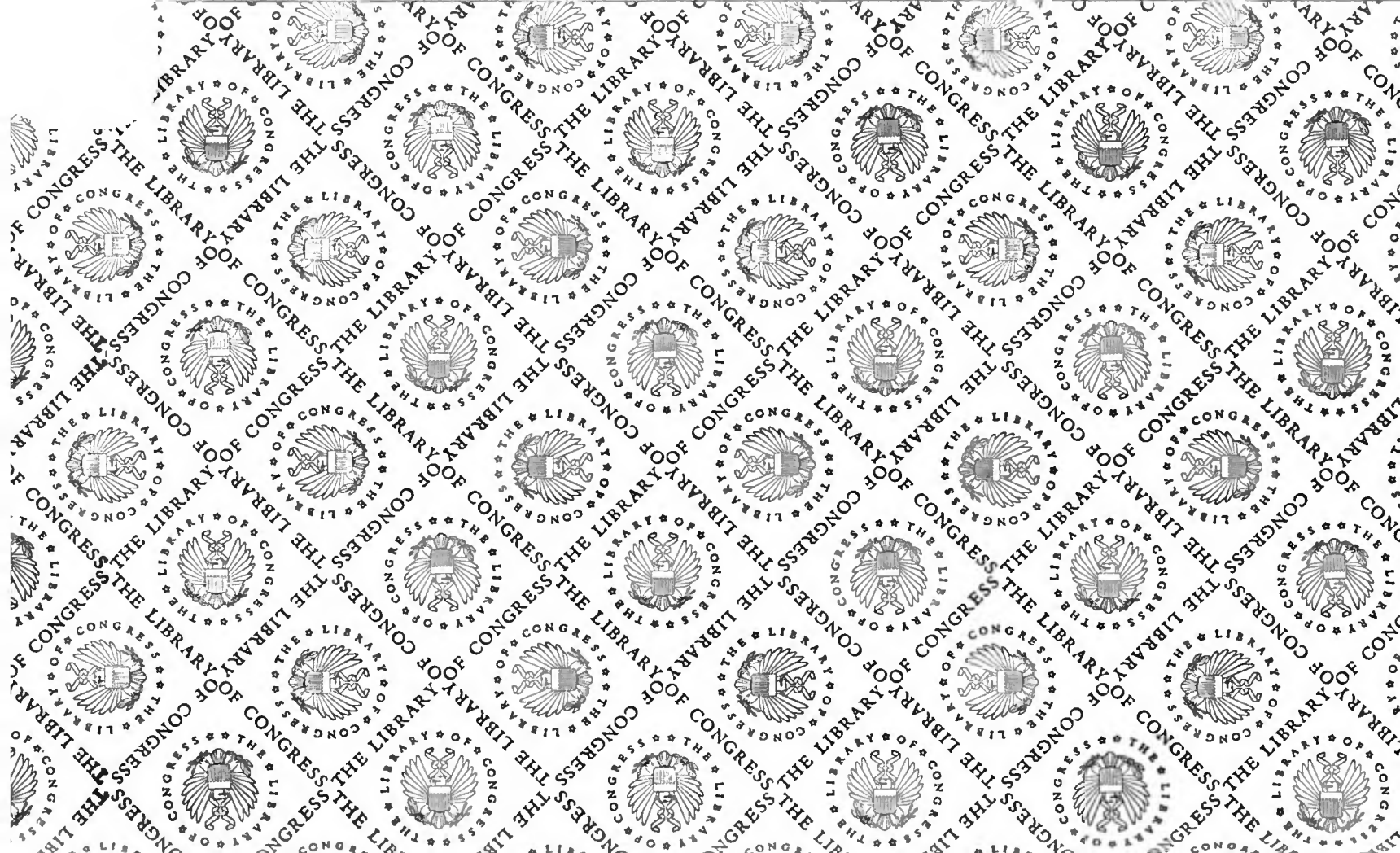
AJR:lh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